SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 800.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

JAMES F. ROWELL, MAUDE ROWELL, AND GEORGE HAMON.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judge of the District Court of the United States for the Western District of Oklahoma, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said district court before you between the United States of America, plaintiff, and James F. Rowell, Maude Rowell, and Georgae Hamon, defendants, a manifest error has happened to the great damage of the said United States of America, as by its complaint appears; we, being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the 30th day of January, 1915, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 31st day of December, A. D. 1914.

[SEAL.] ARNOLD C. DOLDE,
Clerk of the District Court of the United States for the Western District of Oklahoma.

2 The foregoing writ is allowed the date aforesaid.

JOHN H. COTTERAL,
United States District Judge for the Western District of Oklahoma.

UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Supreme Court a true copy of the record, and of the assignment of errors, and of all proceedings in the within-entitled case.

In witness whereof, I hereto subscribe my name and affix the seal of the District Court of the United States for the Western District of Oklahoma at office in the city of Guthrie, in said district, this 25th day of January, A. D. 1915.

ARNOLD C. DOLDE,
Clerk United States District Court,
Western District of Oklahoma.

(Indorsed on back:) 1120. United States of America, plaintiff, vs. James F. Rowell, Maude Rowell, Georgae Hamon, defendants. Writ of error. Filed Dec. 31, 1914. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

4 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to James F. Rowell, Maude Rowell, and Georgae Hamon, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington on the 30th day of January, A. D. 1915, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Oklahoma, wherein the United States of America is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Guthrie, in the district above named, this 31st day of December, A. D. 1914.

JOHN H. COTTERAL,
Judge of the District Court of the United States for the Western District of Oklahoma.

Service of the above citation accepted and further notice and service hereby waived.

ASP, SNYDER, OWEN & LYBRAND,
By HENRY E. ASP,
Attorney for the said James F. Rowell, Maude Rowell, and Georgae Hamon, Defendants.

5 (Indorsed on back:) No. 1120. United States of America, plaintiff, vs. James F. Rowell, Maude Rowell, Georgae Hamon, defendants. Citation. Filed Dec. 31, 1914. Arnold C. Dolde, clerk; by M. V. Haws, deputy.

6 In the District Court of the United States for the Western District of Oklahoma.

THE UNITED STATES OF AMERICA, PLAINTIFF, vs. JAMES F. ROWELL, MAUD ROWELL, GEORGAE Hammon, defendants.	No. 1120. At law.

Petition.

Comes now the plaintiff, the United States, by Homer N. Boardman, United States attorney for the Western District of Oklahoma, acting at the request of the Secretary of the Interior, and by order of the Attorney General; and plaintiff for its cause of action against the defendants alleges:

1. That the defendants and each of them are citizens, residents, and inhabitants of the State of Oklahoma and the western district

thereof, and all of said defendants reside in Commanche County, in said district and State.

2. Plaintiff further alleges that it has the full legal and equitable estate in and to and is the owner in fee simple of the following-described real estate:

The northwest quarter of section thirty (30) of township two (2) north of range eleven (11) west of the Indian meridian, in Commanche County, Oklahoma.

And that the plaintiff is entitled to the immediate possession of said real property.

3. That the defendants and each of them unlawfully keep the plaintiff out of possession of said real estate.

4. That plaintiff further states that it has been so unlawfully kept out of possession of said real property continuously since the 17th day of June, 1911, by said defendants.

7 5. The plaintiff further states that the fair and actual value of the use and occupancy and the rental value of said land is three hundred dollars ($300) per annum; that the defendants have had the entire benefit of the use and occupancy, rents and profits of said land since the said June 17th, 1911; that the plaintiff has therefore been damaged in the sum of four hundred and fifty dollars ($450) by the said defendants unlawfully withholding said possession.

Wherefore the plaintiff prays judgment against said defendants, and each of them, for the possession of said real property and for four hundred and fifty dollars ($450) damages for withholding possession thereof and for costs and other proper relief.

HOMER N. BOARDMAN,
United States Attorney.
ISAAC D. TAYLOR,
Assistant U. S. Attorney.

(Endorsed:) No. 1120. At law. In the District Court of the United States for the Western District of Oklahoma. United States of America, plaintiff, vs. James F. Rowell, Maud Rowell, Georgae A. Hammon, defendants. Petition. Filed Feb. 3, 1913. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

8 Thereafter and on the 1st day of March, 1913, the following proceedings were had in said cause, to wit:

UNITED STATES
vs.
JAMES F. ROWELL ET AL. } No. 1120.

Now on this 1st day of March, 1913, comes the defendants, by W. A. Lybrand, and moves the court for additional time in which to plead herein, and the court being duly advised it is ordered that all defendants be granted 30 additional days to plead herein.

9 In the District Court of the United States for the Western District of Oklahoma.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JAMES F. ROWELL, MAUD ROWELL, AND GEORGAE HAMMON, DEFENDANTS.
No. 1120. At law.

Answer.

And now comes the above-named defendants, and for their answer to the petition of the plaintiff filed herein and first defense thereto,

Deny that the plaintiff has or holds the full legal or equitable estate in and to the northwest quarter (N. W. ¼) of section thirty (30) in township two (2) north of range eleven (11) west of the Indian meridian in Comanche County, Oklahoma; and

Deny that the plaintiff is the owner in fee simple of said lands; and

Deny that the plaintiff is entitled to the immediate possession of said real property or any part thereof; and

Deny that the said defendants, or either of them, unlawfully keep the plaintiff out of the possession of said real estate or any part thereof.

The said defendants deny that the said plaintiff has been unlawfully kept out of the possession of said real property continuously since the 17th day of June, 1910, by said defendants, or either of them, or at any other time.

The said defendants, and each of them, admit that they are in possession of said real property, and aver that they have been in the lawful possession of said real property since the 17th day of June, 1910, continuously, and are still in the lawful possession of the same and each and every part thereof.

10 The said defendants further

Deny that the said plaintiff has been damaged in any sum by reason of the possession of these defendants of said premises and real estate.

Second.

And for a second and further defense to the petition of the plaintiff filed herein the defendants say:

That the defendant, Maud Rowell, is the wife of the above named James F. Rowell, and resides with the said defendant, James F. Rowell, on the land above described;

That the Congress of the United States, by an act entitled "An act making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year end-

ing June 30th, 1911," approved April 4, 1910, 36 U. S. Statutes at Large, part 1, page 280, duly enacted and provided as follows:

"The Secretary of the Interior is hereby authorized and directed to enroll and allot James F. Rowell, intermarried in the Kiowa Tribe of Indians, who was regularly adopted by the tribal council of aforesaid tribe previous to June first, nineteen hundred and nine."

That from said date the said defendant, James F. Rowell, became and continued to be recognized by the United States to be a full member of the Kiowa Tribe of Indians entitled to be enrolled and to receive an allotment of lands as a member of said tribe, and to all the benefits accruing to the members of said Kiowa Tribe of Indians; and then and there and thereby the defendant, James F. Rowell, became entitled to an allotment of one hundred and sixty (160) acres of land as a member of said tribe, or a money settlement in lieu of such allotment.

11 The defendants further says that the said defendant, James F. Rowell, never at any time prior to June 17, 1910, received such allotment of lands from the Government of the United States or any money settlement in lieu of such allotment as a member of said Kiowa Tribe of Indians, or otherwise.

That on said date the Congress of the United States by an act entitled "An act to open to settlement and entry, under the general provisions of the homestead laws of the United States, certain lands in the State of Oklahoma, and for other purposes," approved June 17, 1910, and by section three of said act amont other things, duly enacted and provided as follows:

"That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for northwest quarter of section thirty, township two north, range eleven west, Indian meridian, Comanche County, Oklahoma, to James F. Rowell, a full member of the Kiowa, Comanche, and Apache Tribes of Indians of Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment."

That said defendant, James F. Rowell, immediately upon the passage and approval of said act, duly accepted the same and the provisions thereof, and requested the Secretary of the Interior to cause to be issued and delivered to him, the said James F. Rowell, a patent for said lands as commanded and directed by the said act of Congress aforesaid.

That the said defendant, James F. Rowell, has never received from the Government of the United States any allotment of lands or money settlement in lieu of an allotment of lands as a member of the Kiowa, Comanche, and Apache Tribes of Indians, or otherwise.

12 That the said defendant, James F. Rowell, immediately upon the passage and approval of said act of Congress, duly entered into the possession of said lands, and has erected valuable im-

provements thereon, and has erected a house and barn and other buildings thereon, and has fenced and otherwise improved the said tract of land, and since the 17th day of June, 1910, has continuously resided upon said tract of land with his wife, the defendant, Maud Rowell, and his family, consisting of five children.

That by the said act of Congress the said plaintiff, the Government of the United States, duly conveyed and transferred to the defendant, James F. Rowell, the legal title to the land above described; that ever since the said grant and conveyance of the said lands to the said defendant, James F. Rowell, by the act of Congress aforesaid, the said defendant has been with his said family in actual possession and occupancy of said lands.

The defendants further say:

That immediately upon the passage and approval of said act of Congress aforesaid, approved June 17th, 1910, the Hon. Secretary of the Interior, by order, duly caused to be executed by the proper officers of the Land Department, in the name of the President of the United States of America, a patent for said lands in obedience to the command of said act of Congress; and that said patent was duly entered of record in the proper department office of the United States, as provided by the rules and regulations and laws of the United States.

That the Hon. Secretary of the Interior wrongfully, and without right or authority, withholds the said patent from this defendant, James F. Rowell, and said defendants aver that the legal title to said described tract of land duly passed from the United States to and vested in the said defendant, James F. Rowell, under said act
13 of Congress; and the said Secretary of the Interior, by withholding the delivery of said patent, merely withholds from said defendant the further and convenient evidence of said title.

That the said act of Congress and the acceptance thereof by the defendant, James F. Rowell, constitutes an executed contract by and between the said defendant, James F. Rowell, and the Government of the United States, by which the legal title to said real estate passed to and vested in said defendant, James F. Rowell, and, except as hereinafter stated, the said defendant, James F. Rowell, still owns, holds, and possesses the said legal title.

That on the 3rd day of November, 1911, the said defendant, James F. Rowell, and his said wife, the defandant, Maud Rowell, duly executed, acknowledged, and delivered to their codefendant, Georgae Hammon, a deed of general warranty, conveying to her, the said Georgae Hammon, an undivided one-half interest in and to the said real estate; and that said defendant, Georgae Hammon, and defendants, James F. Rowell and his said wife, Maud Rowell, ever since have been in the open, actual, and exclusive possession of the said real estate; and that the said defendants, James F. Rowell and the said Georgae Hammon, at the time of the commencement of this action, had and held and now have and hold the full legal title thereto.

Wherefore the defendants demand judgment that the plaintiff take nothing by its action herein and for their costs in this behalf expended.

ASP, SNYDER, OWEN, AND LYBRAND,
Attorneys for Defendants.

(Endorsed:) No. 1120. At law. In the District Court of the United States for the Western District of Oklahoma. The U. S. of America, plaintiff, vs. James F. Rowell, Maud Rowell, and Georgae Hammon, defendants. Answer. Filed April 1, 1913. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

14 In the District Court of the United States for the Western District of Oklahoma.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JAMES F. ROWELL ET AL., DEFENDANTS. } No. ——. At law.

Stipulation.

It is hereby stipulated between the parties to the above-entitled cause, through their undersigned counsel, that the plaintiff may have thirty days from this date to file its reply to the answer herein.

Dated this 8th day of April, 1913.

ISAAC D. TAYLOR,
Asst. United States Attorney.
ASP, SNYDER, OWEN, AND LYBRAND,
Attorneys for Defendants.

(Endorsed:) No. 1120. At law. In the District Court of the United States for the Western District of Oklahoma. United States of America, plaintiff, vs. James F. Rowell et al., defendants. Stipulation. Filed April 8, 1913. Arnold C. Dolde, clerk.

15 In the District Court of the United States for the Western District of Oklahoma.

THE UNITED STATES, PLAINTIFF,
vs.
JAMES F. ROWELL ET AL., DEFENDANTS. } No. ——.

Stipulation.

It is hereby stipulated and agreed that the plaintiff, the United States, have until May 23, 1913, inclusive, to file reply herein.

ISAAC D. TAYLOR,
Assistant U. S. Attorney.
HENRY E. ASP,
Attorney for Defendants.

(Endorsed:) No. 1120. At law. In the District Court of the United States for the Western District of Oklahoma. The United States, plaintiff, vs. James F. Rowell et al., defendants. Stipulation. Filed May 5, 1913. Arnold C. Dolde, clerk.

16 In the District Court of the United States for the Western District of Oklahoma.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* JAMES F. ROWELL, MAUD ROWELL, AND GEORGE HAMON, defendants.	No. 1120. At law.

Reply.

Now comes the plaintiff, and for its reply to the answer of the defendant herein states as follows:

First. That it denies each and every allegation contained in the answer of the defendants herein, except such portions of said answer as admit allegations in the plaintiff's petition, and except, further, such portions of said answer as are expressly admitted in this reply.

Second. Plaintiff admits that the defandant Maud Rowell is the wife of the defendant James F. Rowell; that the Congress of the United States passed the act approved April 4th, 1910 (36 United States Statutes at Large, part 1, page 280), containing a provision as alleged in the answer herein; that after the passage of the last-mentioned act the United States recognized said James F. Rowell as a member of the said Kiowa Tribe of Indians, as required by the said mentioned act of Congress; that the defendant James F. Rowell never at any time prior to June 17th, 1910, received an allotment of land from the Government of the United States or any money which purported to be in lieu of such allotment, as a member of the Kiowa Tribe of Indians, or otherwise; that Congress enacted the act mentioned in the answer, approved June 17, 1910, section three of which contained the provisions as set forth in said answer; that the said defendant, James F. Rowell, has never received from the

17 Government of the United States any allotment of lands or money settlement purported to be in lieu of an allotment of land as a member of the Kiowa, Comanche, or Apache Tribes of Indians, or otherwise.

That on the 3rd day of November, 1911, the said James F. Rowell and his said wife, Maud Rowell, executed, acknowledged, and delivered to the said Georgae Hamon a deed of the form known as general warranty deed, purporting to convey to her, the said Georgae Hamon, an undivided one-half interest in and to the said real estate in the petition herein mentioned.

Third. In addition to the denial already contained herein the plaintiff especially denies the allegations contained in the defendants' answer in words or substance as follows:

That the said James F. Rowell, after the passage of the first-mentioned act of Congress, became entitled to a money settlement in lieu of an allotment, and that the said James F. Rowell became entitled absolutely and as a vested right to an allotment of land as a member of the Kiowa Tribe of Indians, or any other tribe; that the said James F. Rowell, immediately after the passage and approval of the second-mentioned act of Congress entered into the possession of said lands, but plaintiff says that the possession of said James F. Rowell of the said lands dates from the 17th day of June, 1911; that by the said act of Congress of June 17th, 1910, the Government of the United States conveyed or transferred to James F. Rowell the legal or equitable title to the land in the petition and the said act of Congress described; that the said last-mentioned act constituted a grand or conveyance of said lands to the said defendant, James F. Rowell; that immediately upon the passage and approval of said act of Congress approved June 17th, 1910, or at any time thereafter, the honorable Secretary of the Interior, by order or otherwise, caused to be executed by the proper officers of the Land
18 Department or any other person in the name of the President of the United States of America a patent for said lands; that said alleged patent or any patent therefor was duly entered of record in the proper department office of the United States, as provided by the rules and regulations and laws of the United States; that the honorable Secretary of the Interior wrongfully or without right or authority withholds the said patent from the defendant, James F. Rowell; that the legal title to said described tract of land passed from the United States to and vested in the said defendant James F. Rowell under said act of Congress; that the said Secretary of the Interior, by withholding the delivery of said patent or in any manner withholds from the defendant any evidence of title to said land to which the said defendant James F. Rowell is entitled; that the said act of Congress constitutes an offer, and that any purported acceptance thereof by the said defendant, James F. Rowell, would constitute an executed contract by and between the said James F. Rowell and the Government of the United States by which the legal title to said real estate would or did pass to or vest in said defendant James F. Rowell; that the said defendant, James F. Rowell, owns, holds, or possesses the legal title to said land; that the said James F. Rowell or his wife, Maud Rowell, owned or had any interest whatever in said real estate which they could or were entitled to convey to the said Georgae Hamon; that the said James F. Rowell and the said Georgae Hamon at the time of the commencement of this action had or held or now have or hold the full legal title to said land or any title whatever, legal or equitable, to any portion thereof.

Fourth. And the plaintiff replying further alleges:

That the said act of June 17th, 1910, did not constitute a grant of the land therein mentioned to the said James F. Rowell, but was simply a direction to the Secretary of the Interior to issue patent therefor to said Rowell; that before the patent was or could be

19 issued the Secretary of the Interior was requested by Members of Congress of the United States and of the Congress which had passed the said act of June 17th, 1910, to withhold action thereon and give that body an opportunity to reconsider and rescind its action; that the patent was therefore not executed or prepared, and that Congress as soon as it had an opportunity to investigate the matter repealed the act directing the Secretary of the Interior to issue said patent, said repealing act being entitled, "An act to repeal an act authorizing the issuance of a patent to James F. Rowell," approved December 19, 1910, Public No. 324 (36 Statute, 887), which reads as follows:

"That so much of the proviso to section three of the act approved June seventeenth, nineteen hundred and ten, entitled 'An act to open to settlement and entry under the general provisions of the homestead laws of the United States certain lands in the State of Oklahoma, and for other purposes,' which proviso reads as follows: 'That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for northwest quarter of section thirty, township two north, range eleven west, Indian meridian, Comanche County, Oklahoma, to James F. Rowell, a full member of the Kiowa, Comanche, and Apache Tribes of Indians of Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment,' be, and the same is hereby, repealed."

That at no time has the defendant James F. Rowell or any of the other defendants had or obtained a vested right or interest in said described land; that it was wholly within the power of Congress and the plaintiff to withhold issuance of patent to said land to the said James F. Rowell, and that as a member of said Kiowa, Comanche, or Apache Tribes of Indians, the said James F. Rowell could obtain no vested right in said land prior to an actual conveyance of said land to him, as such Indian, by unrestricted patent in fee; that as to said James F. Rowell, the plaintiff has at all time herein mentioned had and retained the full power which it possesses over the making of allotments to members of Indian tribes, which power extends to the complete control of the allot'ing of an Indian,

20 a member of a tribe of Indians, to the time that an unrestricted patent in fee simple for an allotment is actually executed and delivered to the allottee; that as to the said James F. Rowell, the said plaintiff has never, at any time, relinquished any of such control; that the said James F. Rowell is not a member of any of the tribes of Indians herein mentioned by blood, and the recognition by plaintiff of the said James F. Rowell as a member, by adoption, of said tribes of Indians constituted a mere gratuity on the part of the United States towards said James F. Rowell, and any property which might be given to him by virtue of such recognition would be given by the plaintiff as a gift, and that the plaintiff would have full power to revoke and recall any gifts so made to the said James F. Rowell prior to the full and actual delivery thereof in the

usual form required by law; that the said land mentioned is of great value, and of a value, as plaintiff is informed and believes, of fifty thousand dollars and over, and that, under no circumstances, would the said James F. Rowell, as a member of said tribe of Indians, be legally or equitably entitled to said tract of land, with its great value, as aforesaid, as an allotment, the same being far in excess in value of any portions of the funds and property of said tribes distributed to any of the other members thereof, none of which exceed $8,000,000 in value; that at the time of the passage of the said act of June 17th, 1910, Congress was not advised of the great value of said tract of land.

Replying further, the plaintiff avers that the said land lies near the town of Lawton, Oklahoma, and is now and was at all the times herein mentioned, and was long prior to the said 17th day of June, 1910, of a value in excess of fifty thousand dollars; that neither Congress or the President of the United States of America, at the time of the passage and approval of the said act of June 17th,
21 1910, knew that said land was of such great value, but understood and believed that the same was of the value not to exceed eight thousand dollars; that had Congress and the President known of the then value of said land and that the same was in excess of fifty thousand dollars, or that the same was in excess of eight thousand dollars, the said act of Congress would not have been passed and approved; that soon after the passage of said act of June 17th, 1910, certain Members of Congress and the honorable Secretary of the Interior and the President first learned of the said value of said land, and thereupon Congress desired to reconsider the matter and rescind its action, and the same was done as aforesaid, and the President refused to issue or cause to be issued a patent for said land to the said James F. Rowell, and still so refuses; that the said James F. Rowell is a white man and had prior to April 4th, 1910, claimed a right to an allotment of land as a member of the Kiowa Tribe of Indians, by reason of intermarrying with a blood member of that tribe, which said claim was and had been duly denied, and the said James F. Rowell was not a member of said tribe or recognized as such until the passage of the said act of April 4, 1910.

Wherefore, plaintiff prays judgment as asked for in its petition herein.

HOMER N. BOARDMAN,
U. S. Attorney.
ISAAC D. TAYLOR,
Asst. U. S. Atty.

(Endorsed:) No. 1120. At law. In the District Court of the United States for the Western District of Oklahoma. The United States of America, plaintiff, vs. James F. Rowell, Maud Rowell, and Georgae Hamon, defendants. Reply. Filed May 21, 1913. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

22 In the District Court of the United States for the Western District of the State of Oklahoma.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JAMES F. ROWELL, MAUD ROWELL, AND Georgae Ramon, defendants.
No. 1120. At law.

Motion to strike certain portions of the reply of the plaintiff to the answer of the defendant.

And now comes the above-named defendants and move the court to strike all that part and portion of the fourth paragraph of plaintiff's reply to the answer of the defendants herein from said reply, to wit:

"That the said act of June 17th, 1910, did not constitute a grant of the land therein mentioned to the said James F. Rowell, but was simply a direction to the Secretary of Interior to issue patent therefor to said Rowell; that before patent was or could be issued the Secretary of Interior was requested by the Members of the Congress of the United States and of the Congress which had passed said act of June 17, 1910, to withhold action thereon and give to that body an opportunity to reconsider and rescind its action; that patent was therefore not executed or prepared and that Congress as soon as it had an opportunity to investigate the matter repealed the act directing the Secretary of Interior to issue said patent,"

for the reason that said portion of said paragraph four of the reply of the plaintiff is irrelevant and redundant matter and does not constitute any defense to the rights of the defendants under their answer herein.

2nd. That the defendants further move the court to strike from said reply the following portions of the said reply, to wit:

"Said repealing act being entitled 'An act to repeal an act authorizing the issuance of patent to James F. Rowell, approved December 19, 1910, Public Number 324 (36 Statutes, 887), which is as follows:

23 "'That so much of the proviso to section three of the act approved June seventeenth, nineteen hundred ten, entitled "An act to open to settlement and entry under the general provisions of the homestead laws of the United States certain lands in the State of Oklahoma, and for other purposes," which proviso reads as follows: "That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for the northwest quarter of section thirty, township two north, range eleven west, Indian meridian, Comanche County, Oklahoma, to James F. Rowell, a full member of the Kiowa, Comanche, and Apache Tribes of Indians of Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of all claim to an allotment of land or money

settlement in lieu of an allotment," be, and the same is hereby, repealed,'"

for the reason that same is irrelevant and redundant matter and can constitute no defense to the cause of action set forth in the answer of the defendants herein, and for the further reason that said act of Congress set forth in said paragraph is an attempt on the part of the Congress of the United States to destroy the vested rights of said defendants under said act of Congress set forth in the answer of the defendants, approved June 17th, 1910, and in violation of the Constitution of the United States, and particularly the fifth amendment to the Constitution of the United States, which provided "no person * * * shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

3rd. The defendants further move the court to strike out all the residue of said fourth paragraph of said reply for the reason that same is irrelevant and redundant matter and constitutes and can constitute no defense to the rights of the defendants set forth in their answer to the petition of the plaintiff filed herein.

ASP, SNYDER, OWEN AND LYBRAND,
Attorneys for Defendants.

(Endorsed:) No. 1120. At law. In the District Court of the United States for the Western District of the State of Oklahoma. United States of America, plaintiff, vs. James F. Rowell et al., defendants. Motion to strike certain portions of the reply of the plaintiff to the answer of the defendant. Filed May 23, 1913. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

24 Thereafter, and on the 31st day of July, 1913, the following proceedings were had in said cause, to wit:

UNITED STATES
vs.
JAMES F. ROWELL ET AL. } No. 1120.

On this 31st day of July, 1913, it is ordered that the motion to strike from reply be, and the same is, assigned for hearing at Oklahoma City on August 7th, 1913, at 10 a. m.

25 Thereafter, and on the 7th day of August, 1913, the following proceedings were had in said cause, to wit:

UNITED STATES
vs.
JAMES F. ROWELL ET AL. } No. 1120.

Now, on this 7th day of August, 1913, it is ordered that the hearing upon the motion to strike from reply be, and the same is hereby, reassigned for hearing at Guthrie, Oklahoma, on Wednesday, August 13th, 1913.

26 Thereafter, and on the 13th day of August, 1913, the following proceedings were had in said cause, to wit:

UNITED STATES
vs.
JAMES F. ROWELL ET AL. } No. 1120.

Now, on this August 13th, 1913, it is ordered by the court that the hearing upon the motion of the defendants filed herein to strike from plaintiff's reply be, and the same is hereby, continued until the further order of the court.

27 Thereafter, on the 17th day of December, 1913, the following proceedings were had by said court in said cause, to wit:

THE UNITED STATES, PLAINTIFF,
vs.
JAMES F. ROWELL ET AL., DEFENDANTS. } No. 1120.

Now, on this December 17, 1913, it is ordered that the motion to strike from the plaintiff's reply be, and the same is, assigned for hearing at Guthrie on January 6th, 1914, at 9 o'clock a. m.

28 In the United States District Court for the Western District of Oklahoma.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JAMES F. ROWELL, MAUD ROWELL, AND GEORGAE HAMON, DEFENDANTS. } No. 1120. At law.

Journal entry.

Now, on this 7th day of January, A. D. 1914, the same being one of the judicial days of the January, 1914, term of this court, this cause comes on for hearing on the motion of the defendants to strike out as redundant and irrelevant matter certain of the allegations of the reply of the plaintiff to the answer of the defendants herein, the plaintiff appearing by Isaac D. Taylor, United States district attorney, and the defendants appearing by Asp, Snyder, Owen, and Lybrand, attorneys, and thereupon the said motion is argued and the court by counsel for the plaintiff and defendants, and thereupon, the court being sufficiently advised in the premises, overrules said motion, reserving the question of law involved in said motion for determination at the final hearing of said case; and thereupon the said plaintiff and the said defendants waive a jury in said cause and consent that the said cause may be tried by the court at a future term of the court.

JOHN H. COTTERAL, *Judge.*

O. K.
H. E. ASP.

(Endorsed:) 1120. United States of America vs. James F. Rowell et al. Order overruling motion to strike. Filed Jan. 7, 1914. Arnold C. Dolde, clerk.

29 Thereafter, on the 29th day of May, A. D. 1914, the following proceedings were had by said court in said cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
J. F. ROWELL ET AL., DEFENDANTS. } No. 1120.

Now, on this 29 day of May, 1914, it is ordered by the court that said cause be assigned for trial at Enid, in said district, on June 17, 1914, at 9 o'clock a. m.

30 Thereafter, on the 19th day of June, A. D. 1914, the following proceedings were had by said court in said cause, to wit:

THE UNITED STATES, PLAINTIFF,
vs.
JAMES F. ROWELL ET AL., DEFENDANTS, } No. 1120.

Now, on this 19th day of June, 1914, the plaintiff appears by Isaac D. Taylor, Esq., United States attorney, and the defendants appear by their attorney, Henry E. Asp, Esq. It is thereupon ordered that this cause be, and the same is hereby, reassigned for trial at Enid, Oklahoma, on June 26th, 1914, at 9 o'clock a. m.

31 Thereafter, on the 29th day of June, A. D. 1914, the following proceedings were had by said court in said cause, to wit:

THE UNITED STATES, PLAINTIFF,
vs.
JAMES F. ROWELL ET AL., DEFENDANTS. } No. 1120.

Now, on this 29th day of June, 1914, it is ordered by the court that said cause be reassigned for trial on July 6th, 1914, at 9 o'clock a. m.

32 In the United States District Court for the Western District of Oklahoma.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JAMES F. ROWELL, MAUDE ROWELL, AND GEORGAE HAMON, defendants. } No. 1120. At law.

Rejoinder.

And now comes the above-named defendants, and for their rejoinder to the reply of the plaintiff filed herein the said defendants say:

They deny each and every allegation in said reply contained and set forth, except such as admit allegations made in the answer of the defendants filed herein, and except such as are hereinafter specifically admitted; and said defendants allege and aver the fact to be that the said act of Congress alleged and set forth in said fourth paragraph of the said reply of the said plaintiff, being "An act to

repeal an act authorizing the issuance of a patent to James F. Rowell, approved December 19, 1910," Public, Number 324, 36 U. S. Stat., page 887, as set forth in the said fourth paragraph of said reply, is unconstitutional and invalid in this, to wit, that the said act of Congress is a violation of the fifth amendment to the Constitution of the United States, which among other things provides: "That no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation," and the said defendants allege and
33 aver the fact to be that the said act of Congress, if enforced, will deprive these defendants of their property without due process of law, and will take the property of these defendants *defendants* for public use without just compensation, and these defendants invoke on their behalf the protection of said provisions of the Constitution of the United States.

Wherefore these defendants pray judgment against the plaintiff as in its answer filed herein is prayed.

ASP, SNYDER, OWEN & LYBRAND,
Attorneys for Defendants.

(Endorsed:) No. 1120. In the United States District Court for the Western District of Oklahoma. United States of America, plaintiff, vs. James F. Rowell, Maude Rowell, and Georgae Hamon, defendants. Rejoinder. Filed July 6, 1914. Arnold C. Dolde, clerk.

34 In the United States District Court for the Western District of Oklahoma.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* JAMES F. ROWELL, MAUDE ROWELL, AND GEORGAE HAMON, defendants.	No. 1120.	At law.

Journal entry.

Now, on this 6th day of July, A. D. 1914, the same being one of the regular judicial days of the June, 1914, term of this court, this cause comes regularly on for hearing, the plaintiff appearing by Isaac D. Taylor, United States district attorney, and W. B. Herod, assistant United States district attorney, and H. E. Bretschneider, special assistant United States attorney, and the said defendants appearing by Asp, Snyder, Owen, and Lybrand, their attorneys;

And thereupon the said defendants asked and obtained leave to file their rejoinder to the reply of the plaintiff, and leave is given to said defendants to file such rejoinder without prejudice to the assignment of said cause for trial, which is accordingly done.

And thereupon the said plaintiff and the defendants each respectively announce themselves ready for trial.

And thereupon comes a jury of twelve good and lawful men, who are duly selected, empanelled, and sworn to try the issues in said cause.

And thereupon the respective parties make to the jury a statement of their case.

35 And thereupon the said plaintiff introduces its testimony and rests its case.

And thereupon the said defendants introduce their testimony and rest their case.

And thereupon the plaintiff requests in writing that the court charge the jury as set forth in the proposed instructions numbered "First" to "Fourth," inclusive, submitted by plaintiff, but each and all of said requests by plaintiff are, by the court, refused, to each and all of which refusals the plaintiff duly excepts, and the said defendants request the court, in writing, to instruct the jury to find a verdict for the defendants, which request of the said defendants is granted by the court, to which the plaintiff duly excepts.

And thereupon the said jury, by the direction of the court, returns to the court their verdict for the defendants.

And thereupon the said plaintiff files instanter its motion to set aside the verdict of the jury herein and to grant to the plaintiff a new trial herein, which motion is considered by the court, and the court finds that the said motion should be overruled.

It is therefore considered, ordered, and adjudged by the court that the motion of the said plaintiff to set aside the verdict of the jury herein and to grant to the plaintiff a new trial herein be, and the same is hereby, overruled, to which ruling of the court the said plaintiff duly excepted and still excepts.

And thereupon the court finds that the said defendants are entitled to judgment herein as against the plaintiff upon the verdict of the jury herein.

36 It is therefore considered, ordered, and adjudged by the court, upon the verdict of the jury aforesaid, that the said defendants are vested with the legal fee title to the lands in controversy herein, to wit:

The northwest quarter (NW. ¼) of section number thirty (30) in township number two (2) north of range number eleven (11) west of the Indian meridian, in Comanche County, State of Oklahoma; and that the plaintiff has no title to said lands.

It is further considered, ordered, and adjudged by the court that the said plaintiff take nothing by this action, and to said judgment of the court the plaintiff at the time duly excepted and still excepts.

And thereupon the said plaintiff asks and is granted ninety days from this date within which to make and file a bill of exceptions herein.

Dated July 6th, 1914.

JOHN H. COTTERAL, *Judge.*

O. K.

ISAAC D. TAYLOR,
U. S. Atty. for Pltff.

HENRY E. ASP.

(Endorsed:) No. 1120. At law. In the U. S. District Court for the Western District of Oklahoma. U. S. of America, plaintiff, vs. James F. Rowell et al., defendants. Journal entry. Filed July 6, 1914. Arnold C. Dolde, clerk.

37 In the District Court of the United States for the Western District of Oklahoma.

UNITED STATES, PLAINTIFF, *vs.* JAMES F. ROWELL, MAUDE ROWELL, AND GEORGAE Hamon, defendants.	Case No. 1120.

We, the jury in the above-entitled case, duly impaneled and sworn, upon our oaths find for the defendants.

W. F. DIMICK, *Foreman.*

(Endorsed:) No. 1120. United States vs. James F. Rowell et al. Verdict filed July 6, A. D. 1914. Arnold C. Dolde, clerk.

38 In the United States District Court, Western District of Oklahoma.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* JAMES F. ROWELL, MAUD ROWELL, GEORGAE Hamon, defendants.	No. 1120. At law. Motion for new trial.

Comes now the plaintiff, the United States, and hereby makes application that the court vacate the verdict and judgment rendered and grant a new trial herein, and states that plaintiff is aggrieved herein for the following causes affecting materially the substantial rights of the plaintiff:

First. Irregularity in the proceedings of the court and orders made by it by which plaintiff was prevented from having a fair trial.

Second. Errors of law occurring at the trial and duly excepted to by plaintiff.

Third. That the verdict and judgment is not sustained by sufficient evidence and is contrary to law.

ISAAC D. TAYLOR,
United States Attorney.
H. E. BRETSCHNEIDER,
Special Asst. U. S. Atty.
W. B. HEROD,
Asst. U. S. Atty.

(Endorsed:) No. 1120. At law. In U. S. Dist. Court West. Dist. Okla. United States, pltff., v. James F. Rowell et al., defts. Motion for new trial. Filed July 6, 1914. Arnold C. Dolde, clerk.

39 Thereafter, on the 3rd day of October, A. D. 1914, the following proceedings were had by said court in said cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
J. F. ROWELL ET AL., DEFENDANTS. } No. 1120.

Now, on this 3rd day of October, 1914, upon application of the plaintiff and for good cause shown, and upon the minutes and proceedings of this court, it is ordered by the court that plaintiff have 30 days' additional time to that heretofore allowed in which to make, serve, and file its bill of exceptions herein.

40 Thereafter, on the 27th day of October, A. D. 1914, the following proceedings were had by said court in said cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
J. F. ROWELL ET AL., DEFENDANTS. } No. 1120.

Now, on this 27th day of October, 1914, for good cause shown and upon the application of the plaintiff, it is ordered that plaintiff have 60 days' additional time to the time heretofore granted it in which to make, serve, and file its bill of exceptions herein.

41 In the District Court of the United States for the Western District of Oklahoma.

UNITED STATES OF AMERICA
vs.
JAMES F. ROWELL, MAUDE ROWELL, GEORGAE Hamon. } #1120. At law. Bill of exceptions.

Be it remembered that heretofore, to wit, on the 6th day of July, A. D. 1914, at the city of Enid, in said district, the above-entitled cause came on regularly for trial.

The plaintiff was represented by Isaac D. Taylor, Esq., its United States attorney for the Western District of Oklahoma, and H. E. Bretschneider, special assistant United States district attorney for said district, and W. B. Herod, asst. U. S. attorney.

The defendants were represented by Henry Asp., Esq., of Oklahoma City, Oklahoma.

Thereupon, a jury having been selected and sworn to try the cause, the following proceedings were had:

Counsel for the plaintiff makes a statement of its claim.

42 Government offers in evidence a certified copy of the order reserving a tract of land of which the land in controversy is a part as part of the school reservation of the Fort Sill Indian School, marked Exhibit 1.

Defendant objected; irrelevant, incompetent, immaterial, not responsive to any issue in the case; not properly certified. For the further reason these lands were still subject to action by Congress. Overruled. Exception.

Exhibit 1 is as follows:

43 DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, July 8, 1911.

I, C. F. Hauke, Acting Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true excerpt copy of the original as the same appears on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed on the day and year first above written.

[RED WAFER SEAL.] C. F. HAUKE,
Acting Commissioner.

CGP.

44 (Stamped:) No. ——. Jul. 13, 1911. Recorded at office of Kiowa Indian Agency, Anadarko, Oklahoma.

Ex. 1.

No. of allotment.	Name of allottee.		Male.	Female.	Age.	Subdivision.	Section.	Town.	Range.	Acres.	100ths.	Remarks.
	Indian.	English.										
.....	Fort Sill Boarding School.		.....	.....	.....	S. ½	19	2 N.	11 W.	316	12	
						S. ½	20	2 N.	11 W.	320	00	
						All	29	2 N.	11 W.	640	00	
						All	30	2 N.	11 W.	632	60	
						N. ½	31	2 N.	11 W.	316	68	
						NW. ¼	32	2 N.	11 W.	160	00	

I certify that the lands set aside and described above for agency, school, religious, and other purposes are in accordance with the needs of the se'ıice; that they were reserved after consultation with me, and fully meet with my approval.

JAMES F. RANDLETT,
Lieut. Col., U. S. A., United States Indian Agent.

I hereby certify that the foregoing schedule of lands set aside for agency, school, religious, and other purposes in the Comanche, Kiowa, and Apache Reservation in Oklahoma are correct and strictly in accordance with the sixth section of the act of Congress approved June 6th, 1900 (Public, No. 185), and the instructions of the honorable Commissioner of Indian Affairs, dated July 11th, 1900. (Land authority 66376.)

C. F. NESLER,
United States Indian Inspector.
CFL.

COMANCHE, KIOWA, AND APACHE AGENCY, OKLAHOMA, TY., *June 1, 1900.*

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
June 18, 1901.

The foregoing schedule of lands in the Kiowa, Comanche, and Apache Reservation in Oklahoma, reserved for agency, school, religious, and other public uses is respectfully submitted to the Secretary of the Interior with the recommendation that he approve the same, and cause the lands covered thereby to be reserved for the purposes indicated.

W. A. JONES,
Commissioner.
JCC.

DEPARTMENT OF THE INTERIOR,
June 20, 1901.

The schedule described in the above recommendation of the Commissioner of Indian Affairs is hereby approved, except as to selection of the American Baptist Home Missionary Society, and the Commissioner of the General Land Office is directed to cause the proper notation to be made upon the books of his office.

E. A. HITCHCOCK,
Secretary.
JTB.

45 Plaintiff offers in evidence the deposition of Fred Dennett, which is as follows:

Questions by Mr. ASP:

Q. Please state your name.
A. Fred Dennett.
Q. Age and place of residence?
A. Forty-nine; official residence, Washington, D. C.
Q. What position do you hold?
A. Commissioner of the General Land Office.
Q. How long have you been Commissioner of the General Land Office?
A. Since March 5, 1908.
Q. As such Commissioner of the General Land Office are you familiar with the rules and regulations relating to the issuance of patents from the General Land Office?
A. Yes, sir.
Q. You may state if it is the rule for the President personally to sign patents.
A. No; not personally.
Q. By whom is the President's name signed to the patents issued from the General Land Office?
A. By a clerk specially designated by the President to perform said act.
Q. You were, of course, commissioner during the year 1910?

A. Yes, sir.

Q. Do you know who was the executive clerk designated by the President during that year to sign the name of the President of the United States to patents issued from the General Land Office?

A. Mrs. Mabel P. Leroy.

Q. Was she the executive clerk charged with the performance of that duty during the entire year 1910?

A. She was. A substitute was ready to take her place in case of sickness.

Q. Who was the substitute?

A. Mrs. Aline S. Stump, who served from September 24, 1909, to Juyly 6, 1912.

46 Q. What was the course pursued to secure the issuance of patents during that year which the Secretary of the Interior was directed to issue under the rules and regulations of the General Land Office and the Interior Department?

A. I fail to thoroughly understand that last question.

(Question read.)

A. We issue so many different kind of patents. There are 236 different provisions of law under which we issue patents.

Q. I will ask you if it is not a fact that under the rules and regulations of the Interior Department and the course of business the direction to the Secretary of the Interior to issue a patent would not mean that the patent should be issued in his name—the patent for Government lands?

A. I have never known a patent to issue in the Secretary's name.

Q. Under such circumstances is it not true that the duties of the commissioner are to set in motion by proper order the machinery provided by law to secure the issuance of a patent in the name of the President?

A. On advices from the Secretary of the Interior.

Q. It was his duty to set in motion the machinery?

A. That is right; and the commissioner would act under that.

Q. So that in the patents that were issued in the name of the President, by direction of the Secretary of the Interior, the President did not personally sign his name?

A. No, sir.

Q. Is it not true that in the course of procedure the President was not advised what patents were issued, but the Secretary would make the necessary order and the executive clerks performed the duty?

A. As a general thing.

Q. Have you in the office of the Commissioner of the General Land Office a clerk whose duty it is to prepare patents?

A. We have in the office a division consisting of a chief, called the recorder, and subordinate officers upon whom is the duty of

47 preparing patents.

Q. What division of the General Land Office is that?

A. It is known as the recorder's office, and known as Division B. I will explain that. B has the physical preparation of the patents

in charge. Other divisions of the office have the duty of passing upon the papers to ascertain whether the patent under the law should issue.

Q. To what division of the General Land Office would an order from the Secretary of the Interior for issuance of a patent go?

A. It depends upon the character of the application.

Q. Are you familiar with an act of Congress, Public No. 215, section 3 of which provides for the issuance of a patent by the Secretary of the Interior to one James F. Rowell?

A. I am familiar with it in the sense that I know of the passage of the act, not with the details of the wording.

Q. To refresh your memory I will call your attention to the act [handing paper to witness].

A. I see.

Q. To what department of the General Land Office would an order for the issuance of a patent under section 3 of Public Number 215 go?

A. Division G of this office has jurisdiction over all patents to Indians. The procedure would be, therefore, that the act and the provisions of the act and any work under it should first go to G; and then, if a patent was to be issued, the preparation of the patent itself would by by B.

Q. Who has charge of Division G?

A. Mr. Driesback.

Q. Who has charge of Division B?

A. Mr. Sanford, the assistant recorder being Mr. O'Connell.

Q. Was the matter of the issuing of patents under Public No. 215, act approved June 17, 1910, ever brought to your personal attention that you now recall?

A. In what way?

48 Q. The question of the issuance of the patent under that act?

A. My recollection is that the papers themselves I never had sight of, but that the general question of the issuance of patents was indirectly brought to my attention.

Q. Have you any personal recollection of the preparation of a patent under that act?

A. My personal recollection, as far as I can remember it, is that I suspended action in the course of a somewhat wide discussion of the matter, I think, in the press.

Q. Do you know Mr. McGuire?

A. I do.

Q. Do you ever remember discussing the matter with Mr. McGuire?

A. Very hazily, very hazily. The definite discussion I can not remember.

Q. Let me refresh your memory, if I may. On or about the 22nd of June, 1910, do you remember Mr. McGuire requesting of you the issuance of the patent, and do you remember saying to him that the patent was in process of preparation and if he could come the next day you would deliver it to him?

A. I can not say that I remember that. I am not saying it may not have been said, but I can not remember it.

Q. Mr. McGuire did not come the next day; but the day following do you remember his coming and asking for the patent and your saying to him at that time that if he had been fifteen minutes earlier that you would have delivered him the patent, but you had just had a telephone message from Mr. Carr, private secretary to the Secretary of the Interior, requesting you to hold it up?

A. No; I can not remember that.

Q. It may have been true?

A. I doubt it very much. That is too specific—fifteen minutes; I do not think I said that.

Q. That you had just had information from Mr. Carr?

A. Yes; I might have said that I had just had information to hold it up.

49 Q. Have you any personal knowledge of how far the process of the preparation of the patent had progressed?

A. No; I have not.

Q. Where in the office will I find that information?

A. In Division B.

Q. Who has charge of that?

A. I am of the impression that Mr. O'Connell would have had, probably, the direct supervision of the issuance of the patent. Who the clerk was who may have had the duty of writing it I do not know.

Q. I hand you Defendant's Exhibit 1. Have you ever seen that before?

A. I do not recall seeing this. You must understand that the individual papers in any case do not come to my attention; they go to the proper division, and the division takes charge of them.

Q. That would probably gone to Division B?

A. First to Division G.

Q. And then to Division B?

A. Yes, sir; because Division G would have to pass upon the legal sufficiency of the case; B doing only the clerical work in connection with it.

Q. When the direction came from the Secretary of the Interior to issue a patent in pursuance of an act of Congress there would not be much question about that?

A. Division G would, of course, simply act on it.

Q. And pass it to Division B?

A. To Division B.

Q. Will you please attach that certified copy to your deposition and make it a part of your deposition?

A. Yes, sir.

Q. I believe that is all I have to ask you.

The WITNESS. That is all I know personally.

Cross-examination by Mr. EASTERLING:

Q. I think you said something with regard to the preparation of the patent; that it was prepared in Division B. That is a first draft of the patent, is it not?

A. All the work of writing the patent is done in Division B.

Q. That is subject to approval of others before it is signed?

50 A. I would like to qualify that in this respect, that there may be instances where a patent is of an unusual character that the legal division may state that they desire certain provisions inserted in the patent, and might submit the memorandum with the patent itself. Generally speaking, the rule is that B prepares the whole thing. The details of it you can best get from the division itself.

Plaintiff offers in evidence and reads the deposition of John O'Connell, which is as follows:

51 JOHN O'CONNELL, a witness of lawful age, being first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes and states:

By Mr. ASP:

1. Q. State your name, age, and residence.

A. John O'Connell; age, fifty; residence, 2732 Twelfth Street northeast.

2. Q. Washington, D. C.?

A. Washington, D. C.

3. Q. What is your occupation?

A. I am assistant chief of the Recorder's Division, General Land Office.

4. Q. How is that division designated?

A. It is designated as Division B in the Land Office.

5. Q. What jurisdiction has Division B over the issuance of patents in the General Land Office?

A. The recorder is directed to issue patents under the direction of the commissioner; to prepare the patents and to have them recorded, sealed, signed, etc.

6. Q. Was there filed in Division B of the General Land Office an order from the Secretary of the Interior, dated June 22, 1910, for the issuance of a patent in fee for the northwest quarter of section 30, township 2 north, range 11 west, Indian meridian, Comanche County, Oklahoma, to James F. Rowell?

Mr. EASTERLING. I object to that question as immaterial.

7. Q. That question may be answered yes or no.

A. I was not capable of following this description through; I take it for granted that you have read it cor——

Mr. ASP. Read the question.

(By direction of Mr. Asp, the stenographer read question No. 6 as above recorded.)

52 A. Yes.

8. Q. I call your attention to defendant's Exhibit No. 1, attached to the deposition of the Commissioner of the General Land Office, Mr. Dennett, and ask you to state if that is a certified copy of the order so filed in Division B of the General Land Office by the Secretary of the Interior, June 22, 1910?

Mr. EASTERLING. The same objection; that is immaterial.

A. According to the certificate it so purports.

9. Q. Please refresh your memory and see if you can answer the question directly.

A. That would not come under my jurisdiction, and I can not say other than to give the matter my judgment. This is not a copy issued by the Land Office.

10. Q. You may examine the defendant's Exhibit No. 1, attached to the deposition of Mr. Dennett, and compare it with the original you have in front of you, and state whether or not it is a copy.

(The two copies referred to were compared by the witness and Mr. Asp.)

A. Aside from some notations or marginal notes, which seem to be missing from the copy, it is a copy.

Mr. EASTERLING. I will object to that as being immaterial.

By Mr. ASP:

11. Q. Did the letter of June 22, to which your attention has been called, including the order of the Secretary of the Interior, come to your attention in Division B of the General Land Office in due course of business?

A. It did.

12. Q. Can you now tell the date when it did come to your division, in due course of business?

A. On the 23rd of June, I think.

13. Q. Does not the receiving stamp show June 22nd?

A. It shows that the Secretary acted on it on the 22nd; yes,

53 it was registered in this office, also, on the 22nd.

14. Q. At the time that came to your attention who was the Assistant Commissioner of the General Land Office?

A. Mr. Proudfit.

15. Q. Was he also acting commissioner at that time?

A. That would be beyond my memory to state, other than this note indicates that he was acting at that particular moment, at any rate.

16. Q. What action, if any, was taken in Division B of the General Land Office, upon the order of the Secretary of the Interior, to which your attention has been called?

A. As is usual in cases where a patent is to issue under special legislation, I indicated the form of wording which I thought would be suitable for such a patent, and gave the order to the listing clerk, whose duty it was to make this up into a lot and place it on our records in the usual way that cases received in the division are arranged leading up to patent, and gave the sketch of the patent to

the clerk that would write it, and I presume I talked the matter over with him. The case was listed on our list No. 113, page 45½. This list is made in triplicate, one goes in the lot, given lot No. 831, one becomes our permanent file, and one goes to the status clerk. Very soon after this had been done I was instructed to withhold the issuance of patent in this case and to give whatever papers I had to Mr. Rettigan, who was then secretary to the commissioner.

Mr. Asp. The defense move to strike out that portion of the answer relating to the instructions as not responsive to the question.

17. Q. What was done towards the preparation of the patent, if you know?

54 A. I am unable to state absolutely how far the writing of the patent had progressed when I got the order to withhold it. My best remembrance is that I went down into the room where the patent writer was and asked him if he had that Rowell case, and that he replied, "Yes; I was just going to bring it down"—that is, to the board room, he meant, or possibly he meant my room. I do not know whether I can say in regard to that. I took the order and the papers which make up our record and whatever had been prepared in the way of a patent. At that time it was customary to stick them in an envelope of this kind [indicating], and it is still, where we have a small number of them, to keep them clean. This wrapper which I call your attention to [exhibiting wrapper] also accompanies the list. It is put on to indicate the record. That was a part of the record that would have been with the case at that time.

18. Q. Then you are of the opinion and give as your best judgment that the patent had in fact been written preparatory to being signed?

A. Yes, sir. I will say, however, that it is usual, while I sketched out these patents, to take them to the chief law clerk, or the one next in line in his bureau, for his opinion before the patent is actually examined and sent in for signature. I had not done so in this case, because it had not reached that point.

19. Q. Can you now say what became of the draft of the patent that was written by the patent clerk?

55 A. Yes. I kept it in my desk for perhaps two or three years, with a big writing all over the envelope, "Do not let this go to patent unless on the express order of the commissioner." Why I did that I really do not know. The usual custom with an uncompleted patent is to tear it up as soon as the case is taken from the division. I finally tore this up, thinking it never would be called up again, and threw it in the waste basket some months ago.

20. Q. Are you sure that the name of the President was not affixed to that draft of the patent by the executive clerk designated by the President for the purpose of signing his name?

A. Absolutely sure.

21. Q. Do you now know whether you ever received in your division any other order signed by the Secretary of the Interior than Defendant's Exhibit No. 1?

A. I do not recall any such order.

22. Q. Do you now remember who wrote the patent; that is, performed the work of writing the patent?

A. I do not. I talked that over with the clerks who might probably have been the ones, and neither of them could recall it, and I do not know absolutely who it was that made the copy of the draft.

23. Q. You are quite sure, however, that you did destroy the draft of the patent that was made in pursuance of the order of the Secretary of the Interior?

A. The incomplete draft; yes.

24. Q. Is there in your files that you have a letter to the Secretary of the Interior dated July 12, 1910, signed by Britton & Gray?

A. Such a letter is here. This is the letter that you refer to [exhibiting letter.]

56 25. Q. I call your attention to Defendant's Exhibit 2, which is a letter of July 12, 1910, from Britton & Gray to the honorable Secretary of the Interior. Does that letter appear in the file that you have?

A. Yes, sir.

(The letter referred to, being dated July 12, 1910, from Britton & Gray to the Secretary of the Interior, was marked by the stenographer "Defendant's Exhibit No. 2," and is attached hereto.)

By Mr. ASP:

26. Q. Does Defendant's Exhibit 2 purport to be a certified copy of that letter as it appears in the files?

A. Yes; it appears to be, without having read it through carefully.

Cross-examination by Mr. EASTERLING:

27. XQ. Had you anything whatever to do with the certification of those two exhibits?

A. Apparently not; they seem to have been prepared in the Secretary's office.

28. XQ. What course would that draft of patents which was in course of preparation have taken had you not received the order to hold it up?

A. Why, from the patent writer the patent and order would have been brought either to the examining board or to myself. In this case where I had prepared a sketch presumably he would have brought it over to me. Then in most cases I would have taken the patent form to the law clerk for his approval before having it examined and sent for signature. It would have been, if he had given his approval, given to the examining board, who would compare the patent with the order and carry the prepared patent with its

57 carbon copy to Miss Braddock. I do not know how to designate her other than to speak her name. It is her duty to have put this wrapper on, following it up and turning it over to the President's secretary for signature, after first having had two letters written, one to the President's secretary and one to the recorder, requesting the signature to the patent or patents included in the

letter. Sometimes in this case it would have been referred to the case by our list, Indian fee patent, for instance, list No. 113. Those two letters would have been written, and after they had been signed by the commissioner, taken as authority for the President's secretary and the recorder to affix their signatures. After having been signed it would be sent to the clerk whose duty it would be to insert the dates, the signatures on the carbon copy which becomes a record, and to fix the seal to the patent, also giving it a number. It would then have been a completed patent, ready for delivery.

29. X Q. I believe you stated that you were not sure whether the patent had been fully typewritten?

A. The best of my remembrance is—I would hesitate to swear absolutely to this—that the patent had progressed to the point where it was ready to be brought to me, or to the board. It had not left the room of the patent writer. It was still on his desk. It had just been a few minutes from the time I had given it to him to the time I went down to get it. That is how far it had progressed.

30. X Q. What was it that you did with the paper after you received it back?

A. The sketch of the patent and the form I tore up and threw in the waste basket.

31. X Q. Is that customary with them?

58 A. The customary thing is to do it immediately; for some reason I presume that I thought this might come back very shortly, and I saved the form, as we sometime do when we think the case may be returned very shortly. Ordinarily the immature form, if you may call it that, is torn up immediately, and when the case comes back it is gone entirely over again, put on a new list and given a new lot number, and the proceeding is all over again. Of course, it is many times absolutely necessary. For instance, we formerly used to put in the year, the name of the officials, and so on, and in a short time we might change the year, or the year of independence, or the officials, and so on. Our practice now is not to put in the year until after the patent has been examined, because it is all put in by a stamp to save time.

Redirect examination by Mr. Asp:

32. Rd. Q. Who is the board for the examination of patents?

A. Miss Jones and Mrs. Rice examine special patents or miscellaneous forms. We have two boards, but they get all such as this.

33. Rd. Q. They merely compare and see that there are no clerical errors in the formation of the patent?

A. Well, I would hesitate to say that only, because Miss Jones is—we consider her advice very good in the matter of the preparation of patents, after reading the acts over and seeing whether anything especial is to be inserted in the patent, or anything of the kind.

34. Rd. Q. This board has no power or authority to override the orders of the Secretary of the Interior, has it?

A. No; I presume not.

59 35. Rd. Q. The directions to you to withhold the patent were verbal, were they not?

A. At that time they were verbal. Later I received written instructions to withhold the patent.

36. Rd. Q. That was along sometime in the November following, was it not?

A. Well, no; the written instructions were received on July 11th, in a note signed by Mr. Rettigan; but the instructions at the time the papers were withdrawn by Mr. Rettigan were verbal.

Recross-examination by Mr. EASTERLING:

37. Rx. Q. Those instructions are frequently verbal when first given, are they not?

A. Why, yes; so far as orders in this office are concerned there are more verbal orders than written ones issued in a matter of that kind.

38. Rx. Q. It is your duty to obey those verbal instructions, is it not?

A. Certainly. I could not refuse to give up papers if the commissioner sent for them through his secretary or somebody else.

60 Plaintiff offers in evidence correspondence from the files of the Secretary of the Interior relating to the issuance of the patent, the same being marked Exhibit 2.

Defendants object to all of this correspondence except the letter of July 12, 1910, for the reason the same is irrelevant, incompetent, and immaterial, and not responsive to any issue in the case.

The telegram of July 18th is, in addition to the other objection, hearsay, no record authorized to be kept by law, and not properly proven.

By the COURT. I am disposed to receive all of the testimony which you desire to offer as bearing on this. I think that will be the better plan, and then when the case is closed to determine what the effect of it is. The court does not mean by admitting evidence now to pass upon its effect, but is disposed to allow it to be introduced fully on both sides and then determine the controversy afterwards—rather, determine whether there is any issue of fact that is of any consequence in the determination of the case.

Defendants except to the ruling of the court.

Exhibit 2 is as follows:

61 UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
Washington, D. C., September 25, 1913.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed papers are true copies of the originals as the same appear on the records and files of this department.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[RED WAFER SEAL.] LEWIS C. SAYLIN,
Assistant Secretary of the Interior.

62 (Indorsed:) Secretary. Received Jul. 13, 1910, Department of the Interior.

Britton & Gray, attorneys and counsellors at law, Glover Building, 1419 F Street, NW,

Alex. B.] WASHINGTON, D. C., *July 12, 1910.*

HON. SECRETARY OF THE INTERIOR,
Washington, D. C.

SIR: In the act of Congress approved April 4, 1910, in section 18, the Secretary of the Interior was thereby "authorized and directed to enroll and allot James F. Rowell, intermarried in the Kiowa Tribe of Indians, who was regularly adopted by the tribal council of aforesaid tribe previous to June 1st, 1909."

In the act of Congress approved June 17, 1910, under section 3, it was provided "That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for the NW. ¼ of sec. 30, Tp. 2 N., R. 11 W., Indian meridian, Comanche County, Oklahoma, to James F. Rowell, a full member of the Kiowa, Comanche, and Apache Tribes of Indians of Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment."

In behalf of the aforesaid James F. Rowell we respectfully ask the prompt issuance of patent for the land described. We do not believe it requires any argument or citation of authorities to demonstrate to you that the act of June 17, 1910, is mandatory in its terms and leaves no disc'etion to you. We understand that inquiry has been made in respect to the value of this land and some objection interposed to the issue of a patent on the ground of its value. Manifestly the question of value is entirely outside any possible issue that can be determined by your department. The land was land of the United States, subject to the disposition of Congress, and
63 Congress has directed that it be patented to James F. Rowell. Whether it be worth $100.00 or $100,000.00 cannot possibly affect the result, and whilst we have been entirely willing that the department should make inquiries as it deemed proper, either as to the value of the land or the condition under which the legislation was enacted, we are of opinion that a sufficient time has elapsed to have obtained all desired information and know of nothing which has been said or offered to in any way justify the refusal to issue the patent. We therefore ask prompt issue of patent, and if for any reason you are of opinion that you are not justified in issuing the same, that you may state your conclusion to that effect, so that James F. Rowell may proceed with such remedy as he may properly possess.

Very respectfully,

BRITTON & GRAY,
Attys. for James F. Rowell.

64 Western Union Telegraph Company, Incorporated. Form 1864

Received at 716 File Pierce

117 ch xam 53 nl JULY 18, 1910.

Cherokee, Iowa. 18.

Hon Frank Pierce Acting Secty Interior Washn DC

Yours respecting Rowell allotment received. I appreciate situation Have supposed that Dept is considerably behind in the issuance of Indian patents and homestead patents. Let Rowells patent take its turn and then perhaps slight delay if any will be necessary till Congress convenes. Hope patent can be withheld till after that time

T. P. GORE

101p

65 File.

Dept. of the Interior.
Received
Jul 19, 1910.
Secy's Office,
Division of Mails & Files.

House of Representatives,
Committee on Indian Affairs.

Washington.

PIERRE, S. D., *July 16, 1910.*

Honorable ACTING SECRETARY OF THE INTERIOR,
Washington, D. C.

SIR: I am in receipt of your letter of July 12, 1910, again calling my attention to the act of June 17, 1910 (Public, No. 215), and I note copy of telegram received by you from Senator Gore, also copy of his letter dated July 9th, from New Hampton, Iowa.

I saw Senator Gore yesterday at Mankato, Minnesota, and talked with him regarding the matter, and I am convinced from what he says that, had Congress known the facts, the act referred to would not have been passed containing the provision authorizing the allotment of the tract described to James T. Rowell, and therefore I believe it would be advisable to withold the patent until Congress reassembles in order that there may be opportunity for consideration of the matter with a view to modifying the act or repealing it.

Respectfully,

CHAS. H. BURKE.

66 Dept. of the Interior. Secretary.
Received Answered
Jul. 29, 1910, Jul. 29, 1910,
Sec'y's Office, Department of
Division of Mails & Files. the Interior.

HOUSE OF REPRESENTATIVES,
Washington, 7/10/10.

The Honorable SECRETARY OF THE INTERIOR,
Washington, D. C.

SIR: I write you with reference to the "Clapp amendment" to the Morgan bill, wherein James F. Rowell, a member of the Kiowa Comanche Tribe of Indians in Oklahoma, was allotted at the recent session of Congress a tract of land from the Kiowa Comanche Indian Reservation.

It develops that this amendment allots or grants to Rowell a tract of land that is in truth and in fact too valuable for allotment purposes.

The writer and citizens of this community feel that the issuance of this patent should be withheld until appropriate action can be had by Congress looking to the repeal of this amendment.

While it may be true that the tract is an unimproved tract, still its proximity to one of the additions to this town render it too valuable for allotment purposes. I feel sure the ends of justice would be accomplished in withholding this patent and allotting Rowell a tract of less value and more remote from any town.

I fear frankness was not afforded the Senators who helped secure this legislation by its proponents; otherwise I feel sure Senator Clapp would have been unwilling to have offered and secure the adoption of the amendment on the Morgan bill that had already passed the House.

67 I respectfully but earnestly protest against the issuance of this patent until full investigation can be had, for I feel sure the investigation will bear out the protest of the writer.

Very respectfully, yours,

SCOTT FERRIS.

68

Received at 2.15 p. m.

Secretary.
Received
Aug. 2, 1910,
Department of
the Interior.

Western Union Telegraph Company.
Incorporated.

AUGUST 2nd, 1910.

Oklahoma City, Okla. 2nd.
SECRETARY OF INTERIOR, *Washington, D. C.:*

Am just informed that Rowell, to whom allotment was authorized at Lawton, lived unlawfully with Indian woman and had one or more children before marriage and finally married to escape criminal prosecution. I protest against issuance of Rowell patent until every patent previously due has been issued to every Chickasaw, Choctaw, Cherokee, Creek, and Seminole Indian and all other Indians and homesteaders. Congressional committee will probably be requested to investigate. Withhold patent until investigating committee re-

ports, notwithstanding the presistent and personal demand of Jake Hamon and other beneficiaries for speedy action. Mail me, Muskogee, Okla., copy of any report or opinion on said patent submitted to you by Department of Justice. Call this telegram to the personal attention of Secretary Ballinger, Commissioner Valentine, and Commissioner Dennett.

T. P. GORE.

AUG. 4, 1910.

69 K. M. T. Department of the Interior. F. W. C.
Washington.

Address only
The Secretary of the Interior.
D12442
FWC

Hon. T. P. GORE,
Muskogee, Oklahoma.

SIR: Responding to your telegram of the 2nd instant, in the matter of the issuance of patent upon what is known as the Rowell allotment, adjoining the city of Lawton, Oklahoma, I have to advise you that no report or opinion in this matter has been requested by this department of the Department of Justice nor has any such report or opinion been received from said department. As requested in your telegram, I have given copy thereof to persons named therein.

Very respectfully,

FRANK PIERCE,
Acting Secretary.

70 Department of the Interior.
Washington.

10/24/10. DMC.

Mr. CARR: Will you please phone me, main 2882, the conclusion reached by the Secretary as to issue of patent about which I saw him last week. I would like to call to his attention the case of Ballinger v. Frost, 216 U. S., 240.

JOHN W. YERKES.

71 Department of the Interior.
Washington.

OCTOBER 28, 1910. 5-47

Address only
The Secretary of the Interior.
OL.

JOHN W. YERKES, Esq.,
Union Trust Building,
Washington, D. C.

SIR: In the matter of the demand for issuance of patent covering allotment by Congress to Dr. James F. Rowell I have to advise you that the department must decline at this time to issue the same for

the reason, among others, that it is advised by the chairman of the respective Committees on Indian Affairs of the Senate and House of Representatives that they believe some imposition was practiced either by way of concealment or misrepresentation concerning the land involved, and have requested that no action be taken in reference thereto until an investigation can be had in the premises.

Very respectfully,

R. A. BALLINGER,
Secretary.

72 Department of the Interior.
Washington.

NOVEMBER 9, 1910. 5-47

Address only
The Secretary of the Interior.
OL.

Mrs. MABEL P. LEROY,
Clerk designated by the President to sign land patents,
General Land Office, Washington, D. C.

MADAM: I transmit herewith for your information and guidance letter addressed to you by the President directing that the signature of his name to any patent to James F. Rowell for certain lands in Oklahoma described in section 3 of the act of June 17, 1910, be withheld until further orders or direction.

Very respectfully,

R. A. BALLINGER,
Secretary.

Enc. 1.

73 (Copy.)

THE WHITE HOUSE,
Washington, November 9, 1910.

MADAM: In the matter of patent referred to in the proviso to section 3, act of June 17, 1910, authorizing and directing the Secretary of the Interior to issue patent for certain lands in Oklahoma to James F. Rowell, it is hereby directed that, in compliance with the request and suggestion in that behalf of Charles H. Burke, chairman of the Committee on Indian Affairs in the House of Representatives, and Moses H. Clapp, chairman of the Committee on Indian Affairs in the United States Senate, the signing of my name to any such patent be withheld until Congress reassembles in order that there may be opportunity for further consideration of the matter by that body or until further orders or direction by me.

Very respectfully,

(Sgd.) WM. H. TAFT.

Mrs. MABEL P. LEROY,
Clerk designated by the President to sign land patents,
Interior Department.
(Through the Secretary of the Interior).

74 ERNEST STECKER, called by the plaintiff, duly sworn, testified as follows:

By Mr. TAYLOR:

Q. State your name.

A. Ernest Stecker.

Q. Where do you live?

A. Andarko, Oklahoma.

Q. What is your official position?

A. Superintendent of the Kiowa Indian Agency.

Q. Were you superintendent of the Kiowa Indian Agency during June, 1910, and continuously since that time?

A. I was.

Q. And have been since?

A. Yes, sir.

Q. You may state whether or not as such superintendent you exercised any supervision over the land involved in this controversy here, which is a part, as I understand, of the Fort Sill Reservation, the northwest quarter of section thirty, township two north, of range eleven west, Indian meridian, in Comanche County, Oklahoma.

A. Yes; that is a part of the Indian school reserve; Fort Sill Indian School reserve.

Q. Was that reservation under your supervision down there?

A. Yes.

Q. And under the Indian agency at Anadarko?

A. Anadarko.

Q. State whether or not you at any time directed a notice to be served by any of the officers or employees connected with that agency upon the defendant, James F. Rowell, relative to this land mentioned.

By Mr. ASP. That may be answered yes or no.

A. In June, 1911, I was notified by Mr. Brandon, the principal of the school, that Dr. Rowell had moved onto the allotment during the night and was erecting a house——

Defendant objects; irrelevant, incompetent, immaterial, not
75 responsive, and moves to strike out the answer. Sustained.

Q. Did you cause a notice to be served?

A. I did.

Q. State whether or not that was upon information that the defendant Rowell was taking possession of the land.

Defendant objects; leading and suggestive.

Q. Was the information you had in writing or verbal?

A. My recollection is the first information I had was by phone from Lawton.

Q. You got information by phone from Lawton that the defendant Rowell was taking possession of the land mentioned?

A. Yes, sir.

Defendant objects to the form of the question; not responsive, not an issue in this case, hearsay. Overruled. Exception.

Q. Now, when was it, according to your best recollection?
A. About the seventeen of June.
Q. What year?
A. 1911, I think.
Q. Did you prepare the notice to be served upon the defendant, Rowell?
A. Yes, sir.
Q. I hand you Exhibit 3 and ask you whether or not that is a carbon copy of the original notice which you prepared.
A. Yes; that is a copy of the notice.
Q. What did you do with the original notice?
A. Sent it to Mr. Brandon to be delivered to Mr. Rowell.
Q. Mr. Brandon? Frank E. Brandon?
A. Frank E. Brandon, the principal of the Fort Sill school.
Q. I don't presume you ever saw the original after that?
A. No, sir.
Q. We offer in evidence Exhibit 3, and will show later the delivery of the original to the defendant.
Defendant objects; irrelevant, incompetent, immaterial, not responsive to any issue in the case, not the best evidence, and the
76 answer calls for matters that could not be within the knowledge of the witness. Overruled. Exception.
Exhibit 3 is as follows, and is read to the jury:

Department of the Interior.
United States Indian Service.

KIOWA INDIAN AGENCY,
Anadarko, Oklahoma, June 17, 1911.

Mr. J. F. ROWELL,
Mount Scott, Oklahoma.

SIR: It having been reported to me this day that you are trespassing upon a part of the Ft. Sill School Reserve, comprising the NW. ¼ sec. 30, T. 2 N., R. 11 W., I. M., and are erecting a building thereon, it becomes my duty to request that you immediately vacate said premises, and to hereby warn you against further trespassing thereon.

Respectfully,

ERNEST STECKER,
Supt. & Spl. Disb. Agent.

(Through Mr. Frank E. Brandon, in charge Ft. Sill School.)

Q. State whether or not the defendant Rowell has ever requested or demanded of you possession of the land in controversy and just described?
Defendant objects; irrelevant, incompetent, immaterial, not responsive to any issue in the case. Overruled. Exception.
A. He did not.
Q. Did he, prior to June 17th, 1911, at any time demand or request of you possession of the land involved?

77 Same objection. Overruled. Exception.

A. He did not.

Q. Your Indian agency was the Kiowa, Comanche, and Apache?

A. Yes, sir.

Q. And did the agency embrace other lands around Lawton besides this land in controversy?

A. Some distance from Lawton.

Q. Well, did you make any investigation to ascertain the value of this tract of land?

A. I estimated the value of the tract of land from the value of three hundred and fifty acres that was lying just south of this that sold for town lots sometime prior.

Q. What, in your judgment, from your experience there and your investigation, is the value, or was the value of this land in controversy on June 17th, 1910?

Defendant objects; irrelevant, incompetent, immaterial, not responsive to any issue in the case, the qualification of the witness not shown. Sustained. Exception.

Q. Do you know what the value of the land was at that time?

A. Yes; I have my own opinion about the value of it.

Q. Were you familiar with land values down in that neighborhood—in the vicinity of this land in question under similar conditions?

A. I was.

Q. On June 17th, 1910?

A. Yes, sir.

Q. And as of that date, what in your opinion was the value of the land in controversy?

Defendant objects; irrelevant, incompetent, immaterial, not responsive to any issue in the case, the value of the land having nothing to do with the question under consideration. Sustained. Exception.

That's all.

By Mr. ASP. That's all.

Witness excused.

78 FRANK E. BRANDON, called by the plaintiff, duly sworn, testified as follows:

By Mr. TAYLOR:

Q. State your name.

A. Frank E. Brandon.

Q. What, if any, official position do you occupy?

A. Principal of the Fort Sill School at Lawton, Oklahoma.

Q. What position did you occupy on or about June 17th, 1911?

A. I was district farmer at that time.

By the COURT. Indian farmer?

A. Yes, sir.

Q. Had you been Indian farmer there for some time prior to that?

A. Yes, sir.

Q. Were you serving in that capacity on June 17th, 1910, and prior to that date?

A. Yes, sir.

Q. Well, now, as Indian farmer you were connected with what Indian agency?

A. With the Kiowa Indian Agency.

Q. At Anadarko, Oklahoma?

A. Yes, sir.

Q. You were acting under the supervision of Mr. Stecker, who just testified?

A. Yes, sir.

Q. I hand you Exhibit 3 and ask you to examine that and state whether or not you received the original of that paper?

A. I did.

Q. State to whom you delivered it, if anybody?

A. To Dr. Rowell.

Q. The defendant in this case, James F. Rowell?

A. Yes, sir.

Q. Do you remember whether or not you delivered a copy of it to the defendant, Jake Hamon?

A. I did.

Q. Not a defendant, but to Mr. Jake Hamon, the husband of one of the defendants?

Defendant objects; irrelevant, incompetent, immaterial. Overruled. Exception.

Q. Now, that notice purports to be dated June 17th, 1911. When prior to that, if at all, did you learn anything in regard to
79 the defendant Rowell attempting to exercise any acts of control over this land in controversy, described as the northeast quarter of section thirty, township two north, range eleven west, I. M., in Comanche County, Oklahoma?

A. I didn't learn he pretended to exercise any control over it——

Defendant moves to strike out the answer; irrelevant, incompetent, immaterial. Overruled. Exception.

Q. When, relative to the date of this letter, did you first learn of Mr. Rowell entering upon this allotment or performing any acts of that kind in connecting with it?

Defendant objects; irrelevant, incompetent, immaterial, not responsive to any issue in the case; hearsay.

By the Court. It would be hearsay for the purpose of showing whether or not the defendant was committing any acts upon or with reference to the land. It may be admissable for some other purpose. Objection overruled. Exception.

A. It was about the 17th of June, I think, that he——

Q. Well, was it before you delivered to him the original of this Exhibit 3?

A. Yes, sir.

Q. About how long before?

A. Well, two or three days. I am not certain as to the exact time.

Q. You think not to exceed two or three days?
A. Yes, sir.
Q. How far were you located from this land in controversy?
A. About a mile.
Q. Where does this land lie relative to the city of Lawton?
A. It joins the city of Lawton on the north.
Q. What is the character of the land as to the surface there, being level or otherwise?
A. Yes; it's level prairie land.
Q. Is it high land or low land?
A. High land.
Q. As Indian farmer down there did you have occasion to observe the cattle that the Government grazes on this Indian land
80 around the school there?
A. Yes, sir.

Defendant objects; irrelevant, incompetent, immaterial, not responsive to any issue in the case. Overruled. Exception.

Q. State if you know whether or not this land was occupied and used by the Government for the grazing of Indian cattle up to some time in June, 1911?
A. It was.
Q. Did the defendant Rowell ever make any demand upon you or request for possession of that land?

Defendant objects; irrelevant, incompetent, immaterial, not responsive to any issue in this case. Overruled. Exception.

A. He did not.
Q. Now, when is the first time you ever observed yourself any acts by the defendant in regard to taking possession of this land?
A. On the morning—about the 17th of June, 1911.
Q. What did you observe?
A. Why, I seen someone on the land over there—a number of men—and drove over and found Mr. Rowell—about the 17th of June I noticed a number of men on the land over there.
Q. 1911—now?
A. Yes; and drove over there; found Mr. Rowell and Mr. Hamon and a number of workmen engaged in building a house. So I inquired for Mr. Rowell of Mr. Hamon and was told that he was looking for a spring about a quarter of a mile from the house, or such matter, and went over and found him, and objected to him taking possession of the land; then went down and telephoned Lieut. Stecker that he had taken possession of the land.
Q. Then you received this written notice from Mr. Stecker, directed to Mr. Rowell, to be served?
A. I did.
Q. And you served that how soon after you received it?
A. I don't remember, but within a day or two, anyway.
Q. Well, to refresh your memory, was it served on or prior to June 19th, 1911?

A. Served on or before the 19th.

81 Q. As Indian farmer there, did your duties take you around over this land from time to time?

A. Yes, sir.

Q. Prior to the date in June that you mention that you saw Mr. Rowell and Mr. Jake Hamon out there on the allotment—this land in controversy—had you ever seen Mr. Rowell on the land, or anyone claiming to be in possession for him?

A. I had not.

That's all.

Cross-examination by Mr. Asp:

Q. The only information you have got about the land was received from Mr. Stecker?

A. You mean as to the——

Q. How many sections was in that school reserve?

A. About two sections.

Q. Do you know anything about Congress having passed an act granting this land to Mr. Rowell?

A. Not direct.

Q. At that time you never heard of it?

A. Oh, I had heard of it; yes.

Q. The only instructions you got about it you got from Mr. Stecker?

A. Yes; the only instructions I received was from Mr. Stecker.

Q. You were working under Mr. Stecker?

A. Yes, sir.

Q. You say this land joins the city of Lawton?

A. Yes, sir.

Q. What part of the city of Lawton?

A. It is known as the Gore addition.

Q. Do you know whether this Gore addition is within the corporate limits of the city of Lawton?

A. I think it is; I am not sure.

Q. You don't know. Don't know anything about that. There was three hundred and twenty acres, was it—the Gore addition?

A. I think it is.

Q. How big was the city of Lawton in June, 1910?

A. You mean as to population?

Q. Yes, sir; as to population.

A. Between eight and ten thousand, I think, was the population.

Q. How much town site did they have outside of this Gore

82 addition of three hundred and twenty acres?

A. I couldn't tell.

Q. They had a townsite, did they not?

A. Yes, sir.

Q. Give your best judgment about it. Do you know how many quarter sections of land was laid off in townsite at that time at Lawton?

A. No, sir.
Q. Now, this is upland?
A. Yes, sir.
Q. High land?
A. Yes, sir.
Q. High, pra.ie land?
A. Rolling prairie land.
Q. How often did you see this land in 1910?
A. Well, I couldn't say. I was by it quite frequently.
Q. Are you sure there were cattle kept in that pasture during that year?
A. Yes, sir.
Q. You had cattle in the pasture. How large was the pasture?
A. About six hundred acres.
Q. How many cattle did you have in it?
A. About a hundred head.
Q. On six hundred acres?
A. Yes, sir.
Q. Did you pasture them on that six hundred acres all that year or did you feed them, too?
A. During the grass season they were kept in there.
Q. Well, were they ranged anywhere else during the year?
A. Kept on the school farm during the winter months across the road from there.
Q. Mr. Rowell might have been on that land a good many times and you wouldn't have seen him?
A. Possibly, if he went on there and off again. He didn't go on to remain any time.
Q. The only thing you know about it is that he didn't come to you and demand possession?
A. Yes, sir.

By Mr. TAYLOR:

Q. Was this particular hundred and sixty acres fenced out separate from the rest of that pasture prior to June 17th, 1911?
A. It was not.
Q. Did you ever see any dwelling or building or anything that indicated acts of possession upon that land by anyone other
83 than the Government grazing cattle prior to June 17th, 1911?
A. I did not.
Q. This land, then, on June 17th, 1911, was part of a large pasture—and prior to that time—which was being used to graze Indian cattle under the supervision of the Kiowa, Comanche, and Apache Indian Agency?
A. It was.
Witness excused.

JOHN A. BUNTIN, called by the Government as a witness, duly sworn, testified as follows:

By Mr. TAYLOR:

Q. State your name.
A. John A. Buntin.
Q. Where do you live?
A. Shawnee, Oklahoma.
Q. What official position do you hold at this time?
A. Superintendent and special disbursing agent of the Shawnee Indian Agency.
Q. What position did you hold during June, 1910?
A. I was principal of the Fort Sill boarding school.
Q. Under the supervision of the Kiowa, Comanche, and Apache Indian Agency at Anadarko?
A. Yes, sir.
Q. How far were you located from the land involved in this action here?
A. To the closest part of it, the residence in which I lived was about three quarters of a mile.
Q. Did you have occasion to see that land frequently during the year 1910?
A. Yes, sir.
Q. You may state whether or not if you know the United States grazed cattle in connection with the Indian agency upon the land in controversy and other lands?
Defendant objects; irrelevant, incompetent, immaterial; not responsive to any issue in the case. Overruled. Exception.
A. Yes; we had a Government herd of cattle on that particular tract of land in connection with other lands; pastured them on it during the year 1910.
Q. Were those cattle on that land during the fore part of June, 1910?
A. Yes, sir.
Q. In that pasture? State when if at any time you saw any improvements of any kind that were erected upon this particular piece of land in controversy.
A. No improvements had been erected upon that land prior to the time I left there in 1911.
Q. What time did you leave there?
A. June 5th, 1911.
Q. Do you remember the occasion in June, 1911, of the defendant Rowell or some parties erecting a shack out on that land?
A. No one had erected anything on that land prior to the date I left there, June 5th, 1911.
Q. You hadn't seen any improvements on the land at all?
A. No, sir.

Q. What date in June?

A. June 5th, 1911.

Q. Up to that time there was no house or any improvements of any kind or character on this land?

A. Nothing except a fence on this side that had been put up by the Government.

Q. Which enclosed it together with other lands in one pasture?

A. Yes.

Q. Were you acquainted with the reasonable rental value of such land as that involved in this suit in that vicinity during the year 1910 and eleven?

A. Yes, sir.

Q. What was the reasonable rental value or the value of the use and occupancy of such land during the year 1911?

Defendant objects; irrelevant, incompetent, immaterial, not responsive to any issue in the case. Overruled. Exception.

A. On account of the location of the land for grazing purposes, I would think it was worth two hundred dollars.

Q. Per annum?

A. Yes, sir.

Q. If used in an agricultural way what would be its value—what was its value at this time?

Defendant objects; same reasons, and to the qualification of
85 the witness. Overruled. Exception.

A. If the best part of it had been ploughed out and used for agriculture, I believe it would have been worth three hundred and fifty dollars.

Q. A year?

A. Yes, sir.

Q. As it was, in the condition you last saw it, what was its reasonable——

A. I believe two hundred dollars would be a fair rental value for it in the condition I last seen it.

Q. State whether or not the defendant Rowell or any of the other defendants ever made any demand upon you while you were principal of that school down there or at any other time for the possession of the land in controversy.

Defendant objects; irrelevant, incompetent, immaterial, not responsive to any issue in the case. Overruled. Exception.

A. Mr. Rowell or no one else ever demanded possession of the land while I was in charge of that school.

Q. Were you there in charge of that school during the time intervening between June 16th, 1910, and June 5th, 1911?

A. Yes, sir.

That's all.

By Mr. Asp. That's all.

Witness excused.

Mr. STECKER, recalled by the Government.

By Mr. TAYLOR:

Q. Are you acquainted in a general way with the allotments of the various members of the Kiowa, Comanche, and Apache Indians under the supervision of your agency?

A. You mean as to the valuation?

Q. Yes, sir.

A. Yes, sir.

Q. Please state what was the average value per capita of the lands and moneys of the members of the Kiowa, Comanche, and Apache Tribe of Indians under your supervision and agency in Oklahoma.

86 Defendant objects; irrelevant, incompetent, immaterial, not responsive to any issue in the case.

By the COURT. I will receive it and reserve the ruling upon it until the close of the case. Exception.

A. The average price of an allotment will run between thirty-five hundred and four thousand dollars, and the cash interest in tribal funds will run something like fifteen hundred dollars, and funds that are in the hands of the Treasury—there are still some collections to be made on lands that are sold and not paid for.

Q. So, then, according to your observation, no per capita valuation of the lands and moneys of the members of these tribes would be over eight thousand dollars?

Defendant objects; irrelevant, incompetent, immaterial, not responsive to any issue in the case, leading, conclusion. Overruled at this time. Exception.

A. It would not be.

Q. Now, I will ask you again in this connection what was the value of the land involved in this action upon June 17th, 1910?

Defendant objects; irrelevant, incompetent, immaterial, not responsive to any issue in the case.

By the COURT. That was excluded before, but I will receive the answer now and reserve ruling upon its effect. Exception.

A. You want to know what the valuation of this particular quarter was in June, 1910?

Q. June 17, 1910.

A. I placed a valuation of eighty thousand dollars on the quarter section.

Q. As of that time?

A. Yes, sir.

That's all.

By Mr. ASP:

Q. For what purpose was it valuable at that time? What gave it its value?

A. I fix the valuation on it on account of the land that was sold joining it on the south for town-site purposes.

87 Q. How much was there in that addition that joined it on the south? How many acres?

A. I think something like three hundred and fifty acres.

Q. Do you know how much town site there was already platted in the town of Lawton outside of this three hundred and fifty acres?

A. No; I don't know how many.

Q. Can you approximate it?

A. Well, I don't know how to do that; I am not well enough acquainted with the——

Q. How many population was there in Lawton at that time?

A. There might have been eight thousand.

Q. As a matter of fact, wasn't there about forty quarter sections of land platted besides that three hundred and fifty?

A. I know there's a lot of land platted, but I don't know how much. This land was all sold off by the Government that I am speaking about.

Q. There was about eight thousand people, you say, in Lawton at that time?

A. That is my estimate.

Q. How many are there now?

A. I don't know. There might be six thousand there now.

Q. Not as many now as there was then?

A. I don't think so.

Q. Then your estimate is that this was valuable for town-site purposes?

A. Yes; judging from the land that joined it on the south; those quarters sold for fifteen dollars a lot then—two hundred and eighty-two thousand dollars.

Q. For three hundred and twenty acres?

A. Yes, sir.

Q. Do you know of any Government land being sold there since that time in close proximity to Lawton?

A. Yes; there's some sold there.

Q. Closer, really, to the business center of town than this land?

A. I don't know that it is any closer.

Q. Do you know what that sold for?

A. One piece sold for a hundred and eleven dollars an acre.

Q. Wasn't there one piece of land in close proximity that was sold for twenty dollars an acre joining the town?

88 A. I don't remember of any joining the town that sold lately.

Q. Since June, 1910?

A. We sold a piece between the Frisco and Rock Island Railroads; sold for seventy-five dollars an acre to the city on account of water works going there.

Q. At the last Government sale of lands there, wasn't there some land sold?

A. Yes, sir.

Q. You know what it sold for?

A. I say one piece near Lawton sold for a hundred and eleven dollars and acre.

Q. Wasn't there another piece there sold for seventy dollars an acre?

A. Maybe; I don't know. I didn't have anything to do with the sale of the land; but I heard——

Q. Wasn't seventy dollars the highest price that was paid for any of that land in that sale?

A. No; not according to my information.

Q. Do you really know what it brought?

A. I was told that the best forty sold for a hundred and eleven dollars an acre.

Q. That was a piece of school land?

A. Indian school land; it was east of the creek.

Q. Now, this land is upland?

A. Oh, yes; upland.

Q. There is some broken land on it?

A. There is now.

Q. I mean some rough land on the quarter?

A. Not very much; there's a draw runs through it.

Q. There's a draw through it?

A. I think so. I think the draw runs a little way through it.

Q. Do you really think that since June, 1910, there has been any crying need for an addition to the townsite of Lawton?

A. No; I don't think the town needs any additions.

Q. And you don't place this valuation on this land for farming purposes?

A. Well, I probably place it on the land on some purposes——

Q. I say you didn't place it on purely for farming purposes?

A. No; not for farming purposes.

Q. How many thousand acres of land do you estimate they
89 could sell for townsite purposes down there at Lawton, a little village of eight thousand people?

A. Well, I don't think they need any more land for a long time. I didn't think they needed the three hundred and twenty acres when they wanted it.

Q. Is that all built?

A. Well, it's pretty well built over; they got a school building they use in town on the land.

Q. One school building?

A. Two large school buildings.

Q. There's still some vacant lots there, isn't there?

A. Yes; there's quite a number of vacant lots.

Q. Pretty generally vacant, isn't it?

A. Well, there are more vacant lots than there are improved ones.

Q. Now, what really would be the value of that land for farming purposes?

A. Well, I think it would be ten thousand dollars for it.

Q. Don't you really think that would be a pretty good fair price for it?

A. No.

Q. For farming purposes?

A. I think if it was appraised at ten thousand dollars it would sell pretty well at that figure.

Q. So that really you think now its value for any purpose that is immediately available would be about ten thousand dollars?

A. For agricultural purposes I would value it at that.

Q. You don't think it would be valuable now for townsite purposes, do you?

A. If the proper man got in there with a boom he might make it valuable.

Q. Do you know any proper man that would do it now?

A. No; not just now.

Q. You don't know any just now, do you?

A. I never been there——

That's all.

By Mr. TAYLOR:

Q. Has Mr. Rowell remained in possession of that land since June 17, 1911?

A. As far as I know.

Q. The Government hasn't had possession of it since then?

A. Not since.

90 Q. This value you place upon the land is for town-site purposes, you say?

A. Yes, sir.

Q. Well, how is its location as being desirable land as an addition to the city of Lawton, if an addition is needed?

A. Most of it would be very suitable.

Q. How is that located relative to the better part of the city of Lawton—the better residence section?

A. Well, the addition that the Government sold, three hundred and twenty acres, is between it and this land.

Q. Well, is it a good elevation?

A. Yes, the elevation is good.

Q. Is it level and nice or otherwise?

A. The most part of it is.

Q. What is its location to the city of Lawton and Fort Sill as being between them or otherwise?

A. It's between Fort Sill. It joins the north boundary, north of this particular land.

Q. How much farther north is the fort?

A. The fort proper is about three miles.

Q. State whether or not it is more adapted to an addition there to the city of Lawton than some of this land that you mentioned that sold for a hundred and ten dollars an acre recently?

A. It's better adapted for town-site purposes than the land I mentioned sold for a hundred and eleven dollars an acre.

That's all.

Witness excused.

)efendant moves to strike out all of the testimony of this witness
.ting to the values of this land as irrelevant, incompetent, and
naterial, not responsive to any issue in the case.
y the COURT. The ruling is reserved on that at this time.
Government rests.

J. F. ROWELL, called as a witness by the defendants, duly sworn, testified as follows:

By Mr. ASP:

. State your name.
. J. F. Rowell.
. Where do you live?
. Lawton, Oklahoma.
. You are one of the defendants in this case?
. I am.
. When did you come to this country—I mean the Kiowa, nanche, and Apache country?
. First in 1893. No; in the latter part of 1899.
. You been living in this country since 1899?
. Yes, sir.
. What business are you engaged in in that country?
. Indian trader.
. How long were you an Indian trader?
. Two or three years.
. During what years was it?
. That was 1901 and 1902. My license was issued to me in 1899, lieve, or ninety-eight, but I did not avail myself of it at that .
. Have you any profession.
. Yes, sir.
. What is your profession?
. Doctor of medicine.
. Where were you educated?
. The Hillman Medical College and Hospital, Philadelphia.
. Did you receive a diploma?
. I did.
. Is that one of the accredited medical schools of the country?
. It is.
. Did you have a certificate to practice medicine in the old Ter- ial days in Oklahoma?
. Yes, sir.
. Have you had a certificate from the State since that time?
. Yes.
. Hold it now?
. Yes.
. Were you adopted as a member of the Kiowa, Comanche, and che Tribes of Indians?
. I was.

Q. When was that?

A. In 1909—1909 or ten; I have forgotten those dates.

Government objects, and asks that the answer be stricken; it is not the best evidence and calls for a legal conclusion.

Overruled. Exception.

92 Q. How long have you lived among the Indians there prior to the time of your adoption?

A. Why, about ten or twelve years. I don't remember just now.

Q. During that time what was your intercourse with the Indians?

A. Why, I was in contact with them daily; lived with them. I practiced medicine among them more or less.

Q. Well, did you receive constant calls from the Indians themselves for medical treatment?

A. Yes, sir.

Q. What charge did you make them during that time?

A. I didn't make any.

Q. You never made any charges for work to the Indians. Were you in constant practice among the Indians?

A. Yes, sir.

Q. Was that for ten or twelve years before your adoption?

A. From the time I came there.

Q. From the time you came there up until the time of your adoption?

A. Yes, sir.

Q. Are you an intermarried citizen in any of those tribes?

A. Yes; Kiowa.

Q. When were you married into the tribe?

A. In November, 1911—1903.

Q. How many children have you?

A. I have four now.

Q. How many children did you have on June 17, 1910?

A. Four.

Q. How many did you have at the time you were adopted into the tribe?

A. Four, I think.

Q. Been living with your Indian wife in the tribe since 1903?

A. Yes.

Q. And had four children? Do you remember the passage of the act of April 4, 1910?

A. Yes, sir.

Q. Authorizing and directing the Secretary of the Interior to enroll and allot you as an adopted member of the tribe?

A. Yes, sir.

Q. Did you receive under that act any allotment of land?

A. Under the act——

Q. Act of April 4, 1910?

A. No; I did not.

93 Q. Did you receive any money settlement in lieu of such allotment?

A. I did not.

Q. Do you remember of the passage of the act of June 17, 1910?

A. I do.

Q. Authorizing and directing the Secretary of the Interior to make—to issue a patent in fee for this land?

A. Yes, sir.

Q. Did you ever receive that patent?

A. No.

Q. Did you ever make any request for that patent?

A. Yes, sir.

Q. When and where?

A. During the latter part of June and the month of July, 1911. I made several trips to——

Q. 1910 do you mean?

A. Yes; 1910.

Q. Right immediately after the passage of the act?

A. Yes.

Q. How soon after the passage of the act did you make a request?

A. Three or four days, I think.

Q. Did you make repeated requests?

A. Yes.

Q. At the office of the Secretary of the Interior?

A. Yes; though not in person there.

Q. Well, did you go in person——

A. Yes; I went in person——

Q. To the office of the Secretary of the Interior? What response did you get?

A. If I would go in the morning, I was told to come in the afternoon and the patent would be delivered to me; if I went in the afternoon, I was told to come in the morning.

Q. Did you make repeated requests for it?

A. Yes, sir.

Q. Did you afterwards employ Crisler, Britton & Gray, of Washington, D. C.?

A. Yes.

Q. Did you authorize them to make request or demand for a patent on your behalf?

A. Yes.

Q. You were in Washington at the time of the passage of the act?

A. Yes.

Q. When did you come home from Washington; after the passage of the act?

94 A. Well, I don't remember the day of the month. It was in July, some time following this.

Q. Did you do anything toward taking possession of the land?

A. I went on the place; went over it and selected a building site.

Q. When was that?

A. That was shortly after my return from the East. I don't remember the date.

Q. Some time in July?

A. Some time in July—the early part of August. I am not sure of the date.

Q. When did you, in fact, commence your building?

A. June 17, 1911.

Q. What improvements did you put on there?

A. On that day I simply built the house.

Q. What improvement have you on it now?

A. I have a house, chicken house, barn about eighteen by seventy feet, and have fenced it and cross fenced it. I have dug a well and built a tank.

Q. Have you reduced any of it to cultivation?

A. Have over a hundred acres in cultivation now.

Q. Were any improvements on the place when you commenced to build?

A. Yes; there was a fence on the west and south side.

Q. You now have it fenced all around?

A. And cross fenced.

Q. And you have dug wells?

A. Yes.

Q. Since the passage of that act of June 17, 1910, have you ever received from the Government of the United States any allotment of land?

A. No.

Q. Any other land, or have you ever had any money settlement in lieu of any allotment of land?

A. No.

Q. Have you or not always claimed this land since the act of June 17, 1910?

A. I have.

Q. And have never had any other allotment or settlement?

A. No.

Q. From the Government?

A. No.

Q. Where does this land lie with reference to the town site of Lawton?

95 A. North.

Q. In response to the testimony introduced by the Government, I want to interrogate this witness on the question of value, but I don't think it has anything to do with the case, and I don't want to be held to have waived my objection to it on account of rebutting it.

By the COURT. You will have to determine your own course in the case.

Q. What is this land valuable for now?

A. Farming.

Q. Have you any knowledge of the size of the town site of Lawton?

A. Only in a general way.

Q. You know the Gore addition?

A. Yes.

Q. How much is there in that addition?

A. 320 acres, approximately.

Q. Do you know how much town site is plotted outside of that addition?

A. The Beal addition and the Woods addition, the Mountain View and the Mountain Hill additions—there are so many of them that I don't recall. I presume ten or fifteen, if not more.

Q. How many quarter sections of land to your knowledge or in your judgment is platted as town sites?

A. I should imagine in the neighborhood of fifteen quarter sections; possibly more. As a matter of fact, I don't know.

Q. How many population did Lawton have in June, 1910?

A. I think it was seventy-eight hundred and something, according to the last census; that was 1910, I believe.

Q. How many population do you think they have now?

A. Why, I imagine between five and six thousand.

Q. In your judgment, then, the only value of this land is for farming purposes.

A. Yes, sir.

Q. That's an upland farm?

A. Yes, sir.

Q. What, in your judgment, is its value?

A. About fifty dollars an acre.

Q. For farming purposes?

A. Yes, sir.

96 That's all.

Cross-examination by Mr. TAYLOR:

Q. You never received a patent for this land involved in this case?

A. No, sir.

Q. The Department of the Interior, through its proper agent there at Anadarko, has submitted to you the proposition of selecting you an allotment of land out of the lands available for allotment?

A. They made that proposition; that was tendered to me pending the outcome of this suit, they said.

By Mr. ASP. I want to ask was that proposition in writing?

Q. You refused to make any other selection than the one—this allotment——

Defendant objects; not proper cross-examination; irrelevant, incompetent, immaterial. Overruled.

Q. Than this land down by Lawton that is involved in this action?

A. I did under the copy of the letter sent me by Mr. Bretschneider from the department. I was not communicated with directly. They wrote the office at Anadarko a letter, a copy of which was sent me with the request I take some action.

Q. Well, you got information from the Indian Office you could make another allotment?

A. Yes, sir.

Q. Take some other land? And you refused to do that?

A. I could make a tentative selection of an other land pending the outcome of this suit.

Q. You refused to do that?

A. Yes, sir.

Q. The first time you erected any improvements upon this land was June 17, 1911?

A. Yes, sir.

Q. When did you go to Washington in connection with the passage of the act of June 17, 1910?

A. Sometime the first part of the month of June, I believe. I couldn't say as to the exact date.

97 Q. The Secretary of the Interior prior to that time had refused to approve your adoption as a member of those tribes down there, hadn't he?

Defendant objects; irrelevant, incompetent, immaterial, not proper cross-examination, not responsive to any issue in the case. Overruled. Exception.

A. Yes, sir.

Q. And you didn't become a member of the tribe, then, until the Secretary was directed to enroll you under this act of April 4, 1910?

Defendant objects; irrelevant, incompetent, immaterial, not responsive to any issue. Overruled. Exception.

A. I didn't receive governmental recognition of my adoption.

Q. Until that time?

A. No, sir.

Q. After you became a member of the tribe you construed this act of Congress to your rights as being such that you had a right to an allotment of land and to certain moneys held for the tribe in common; is that correct?

A. Yes, sir.

Defendant objects to the form of the question; not proper cross-examination. Overruled. Exception.

Q. Do you know where these moneys were held that belonged to the members of the tribe?

A. I assume in the Treasury of the United States.

Q. Your interpretation of your rights after the act of April 4, 1910, was to the effect you were under that entitled to an allotment of land and you were entitled as a matter of right to a certain proportionate share of the moneys held by the Government for the members of that tribe?

Defendant objects; irrelevant, incompetent, immaterial; not a question involved in this case. Overruled. Exception.

A. The Government has recognized that right by paying my per capita amount.

98 Q. Do you answer the question yes—that last question I put to you?

A. Yes.

Q. Did you know at that time there were certain tribal lands held in common down under the supervision of the Indian agency that were unallotted?

A. I was informed by the office there was nothing available for allotment.

Q. When was that?

A. Why, when I returned after the passage of the act of April 4, 1910. I made a request for an allotment and for enrollment. That was at the office at Washington, and I was referred to the office at Anadarko. I made my request there in writing twice, I believe, without a reply. I finally made a request by registered mail, and I was then informed there was no land available.

Q. You knew there were certain lands down in the Big Pasture that remained unallotted?

A. I knew in the school lands. At least I didn't know it. I assumed there were lands along down there I could have taken.

Q. You never took up the matter of procuring this particular allotment with the agency at Anadarko, did you, before you went to Washington?

A. No; not this particular quarter.

Q. You never took that up with the Commissioner of Indian Affairs or the Secretary of the Interior?

A. This particular quarter?

Q. Yes, sir.

A. No; not personally, no.

Q. As a matter of fact, the only party you did take it up with was Senator Clapp, wasn't it?

A. No; I took it up with Senator Page and Senator Brandegee and Mr. McGuire.

Q. You didn't have the matter under consideration with the Indian Department at all at the time you were down there working on this act of Congress?

A. I don't quite get your question.

Defendant objects; irrelevant, incompetent, immaterial, not proper cross-examination, not responsive to any issue in the case.

99 A. You are referring to the act of June 17, 1910?

Q. Yes.

A. I didn't take it up in person with them; no. I had representatives——

Q. That matter wasn't taken up with them until after the act had passed?

A. Yes; I think so.

Q. Now, do you know when you first went to see the Secretary of the Interior about this matter?

A. I couldn't give you the exact date; no. The latter part of June.

Q. You never got to see the Secretary personally, did you?

A. No.

Q. So that you never made any demand on the Secretary personally?

A. On Mr. Pierce, but not on Mr. Ballinger. Mr. Ballinger was out of the city. Mr. Ballinger told Senator Bulkeley, of Connecticut, he would leave the matter with Mr. Gray, and said he could act. I saw Mr. Carr several times, and he finally called up Mr. Pierce, but most of my demands was made on Mr. Carr.

Q. Who was Mr. Carr?

A. He was the private secretary to the Secretary of the Interior.

Q. The first formal demand that was made at all by you was, or in your behalf, was this letter of July 12, 1910, by Britton & Gray, wasn't it?

A. Why, that had been sent by Senators Bulkeley and Brandegee and Mr. McGuire and Mr. Hill—all had asked a patent be issued to me.

Q. They were not acting as your agents when they went to see the Secretary about it, were they?

A. They went at my request.

Q. Well, Mr. McGuire and the others, these different Senators and Congressman, were not in your employ?

A. Oh, no, no.

Q. Employed as your agents?

A. No; simply did it as a friendly act.

Q. This letter of July 12, 1910, was the first formal request that was made on the Secretary of the Interior, wasn't it?

A. No; I don't remember it.

100 Q. First written request that you know of, isn't it?

A. The first one that I recall at this time. I am not sure whether I wrote a personal letter or not. I am under the impression I did.

Q. You are under the impression what?

A. I am under the impression I wrote to the department first. I wouldn't make that statement positively; my recollection is that I did.

Q. You have never found any such letter in the files or made an effort to procure such a letter?

A. No.

Q. So that the first letter that you know of is this one of July 12, 1910?

A. Well, I am taking your statement there.

Q. Well, this letter of Britton & Gray?

A. Yes.

Q. Were you in Washington when this letter was written?

A. I believe I was. I was either in Washington or Connecticut. I couldn't say which.

Q. Was Mr. Hamon in Washington during the time this bill was being passed?

A. Yes, sir.

Q. At any time did the Government submit any patent to you purporting to convey this land and tender that to you in lieu of any claim that you might have for any allotment of land or money settlement in lieu of an allotment?

A. They never submitted that patent to me. Not for that particular quarter.

Q. They never submitted any written document of any kind to you offering you this land as an allotment—offering you a patent in fee for this land involved in lieu of any claims of yours of any allotment of land or money settlement in lieu of an allotment?

Defendant objects; irrelevant, incompetent, immaterial, not responsive to any issue. Overruled. Exception.

A. I never received a patent for that particular piece of land; no.

Q. Nor did the Government or anybody in its behalf ever submit to you a written proposition that you would receive a patent
101 in fee for the land involved here in lieu of any claims that you might have to any allotment of land or money settlement in lieu of an allotment?

Defendant objects; irrelevant, incompetent, immaterial. Overruled. Exception.

A. No.

Q. The transfer of one-half interest in this land that you transferred by quitclaim deed to Georgia Hamon, the wife of Jake Hamon?

A. Yes.

Q. The purported consideration for that one-half interest was fifty thousand dollars?

A. The face of the quitclaim showed that; yes.

By Mr. Asp:

Q. Counsel has asked you if they didn't offer to make you an allotment since the passage of this act of June 17, 1910. When was that offer made?

A. I don't know. Lieutenant Stecker requested me to make an allotment, and I am not sure whether Mr. Bretschneider did or not. I was afraid——

Q. Wasn't that in writing?

A. No; it was personally. I received a copy of a letter written by the department to the office at Anadarko and a copy of that letter was transmitted to me.

Q. Through the Secretary of the Interior?

A. From Anadarko. That is, from the Commissioner of Indian Affairs.

Q. Now, what was that letter?

A. Well, that letter was a request to the office to get me to make a selection of land in the Big Pasture; that the land was going to be sold, and they wanted to save a piece of land for me in case I should happen to lose this suit.

Q. That was the contents of the offer—a tentative offer?

A. A tentative offer; yes.

Q. Not to affect your rights in this suit at all?

A. That was the statement in the letter.

102 Q. That came from the Commissioner of Indian Affairs?

A. Yes; I believe it was from the head of the department. I believe it was. Anyway, by a fellow named Wright, who has charge of the land, I suppose.

Q. That offer was made since this suit was commenced?
A. Yes.

By Mr. TAYLOR:

Q. Have you a copy of the letter that you received?
A. I couldn't say; I may have.
Q. You haven't got it here?
A. No; I haven't it here.
Q. Are you sure that letter said you should not make that selection except pending the outcome of this suit?
A. Said I could make that selection, pending the outcome of this suit, and they instructed the office to inform me I would have no hesitancy in making the selection because they wouldn't use it against me.
Q. In other words the office gave you the privilege of making the selection of another allotment, so if you lost this suit you would have the other allotment?
A. That is the letter.
Q. And you wouldn't avail yourself of that offer?
A. No, sir.
Witness excused.
Defendant offers in evidence Exhibits 1 and 2 attached to the deposition, which are as follows:

103 File 1

United States of America.
Department of the Interior.

WASHINGTON, D. C., *March 31, 1913.*

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed papers are true copies of the originals as they appear of record and in the files of the department.

In testimony whereof I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[RED WAFER SEAL.] LEWIS C. SAYLIN,
Assistant Secretary of the Interior.

104

Address only the
Commissioner of Indian Affairs
CRW
JFA

Refer in reply to the following:
Land Sales–
50888–1910
E S S

Defendant's Ex. 1.

Patent in fee.

Department of the Interior.
Office of Indian Affairs. ESS

WASHINGTON, *June 22, 1910.*

The honorable the SECRETARY OF THE INTERIOR.

SIR: Section 3 of the act entitled "An act to open to settlement and entry under the general provisions of the homestead laws of the

United States certain lands in the State of Oklahoma, and for other purposes" (Public, No. 215), approved June 17, 1910, provides:

That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for NW. 4 of sec. 30, T. 2 N., R. 11 W., Indian meridian, Comanche County, Oklahoma, to James F. Rowell, a full member of the Kiowa, Comanche, and Apache Tribes of Indians in Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment.

In accordance with the part of section 3 above quoted, it is respectfully recommended that the Commissioner of the General Land Office be directed to issue a patent in fee to James F. Rowell for the NW. 4 of sec. 30, T. 2 N., R. 11 W., Indian meridian, Oklahoma, containing 160 acres. When issued it should be sent to this office for delivery.

Very respectfully,

R. G. VALENTINE,
Commissioner.

6-EMM-22 M
11051

105 JUNE 22, 1910.

Approved and referred to the Commissioner of the General Land Office for action in accordance with the foregoing recommendations.

JESSE E. WILSON,
Assistant Secretary.
W. C. P.

106 DEFENDANT'S EX. 2.

Cable address "Brigray."

A. B. Browne
Alex. Britton
Evans Browne

Secretary
Received
July 13, 1910.
Department of the Interior.

Britton & Gray,
Attorneys & Counsellors at Law,
Glover Building, 1419 F Street NW.,
Washington, D. C.

Alex. B. JULY 12, 1910.

Hon. SECRETARY OF THE INTERIOR,
Washington, D. C.

SIR: In the act of Congress approved April 4, 1910, in section 18, the Secretary of the Interior was thereby "authorized and directed to enroll and allot James F. Rowell, intermarried in the Kiowa

Tribe of Indians, who was regularly adopted by the tribal council of aforesaid tribe previous to June 1, 1909."

In the act of Congress approved June 17, 1910, under section 3 it was provided "That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for the NW. ¼ of sec. 30, Tp. 2 N., R. 11 W., Indian meridian, Comanche County, Oklahoma, to James F. Rowell, a full member of the Kiowa, Comanche, and Apache Tribes of Indians in Oklahoma, who has heretofore received no allotment of land from any source, this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment."

In behalf of the aforesaid James F. Rowell we respectfully ask the prompt issuance of patent for the land described. We do not believe it requires any argument or citation of authorities to demonstrate to you that the act of June 17, 1910, is mandatory in its terms and leaves no discretion to you. We understand that inquiry has been made in respect to the value of this land and some objection interposed to the issue of patent on the ground of its value.

107 Manifestly the question of value is entirely outside any possible issue that can be determined by your department. The land was land of the United States, subject to the disposition of Congress, and Congress has directed that it be patented to James F. Rowell. Whether it be worth $100.00 or $100,000 cannot possibly affect the result, and whilst we have been entirely willing that the department should make such inquiries as it deemed proper, either as to the value of the land or the conditions under which the legislation was enacted, we are of opinion that a sufficient time has elapsed to have obtained all desired information, and know of nothing which has been said or offered to in any way justify the refusal to issue the patent. We therefore ask prompt issue of patent, and if for any reason you are of opinion that you are not justified in issuing the same, that you may state your conclusion to that effect, so that James F. Rowell may proceed with such other remedy as he may properly possess.

Very respectfully,

BRITTON & GRAY,
Attys. for James F. Rowell.

108 J. L. HAMON, called by the defendant, duly sworn, testified as follows:

By Mr. ASP:

Q. State your name.
A. J. L. Hamon.
Q. Where do you live?
A. Lawton, Oklahoma.
Q. You know James F. Rowell?
A. I do.
Q. You know this land in controversy?
A. Yes.

Q. Were you in Washington at the time of the passage of the act in question, June 17, 1910?

A. I was.

Q. After the passage of that act did you and the defendant Rowell make any request of the Secretary of the Interior for the issuance of that patent?

A. I did.

Q. When was that?

A. Well, it was in a week or ten days after the act passed.

Q. What response did you get?

A. That Mr. Ballinger said he wanted a little more time to investigate the matter.

Q. Did they make a promise to you that they would issue and deliver a patent?

A. Said he expected to deliver it in a very few days after a little further investigation of some matter.

Q. The patent never was issued or delivered?

A. Not to my knowledge. I think it was issued probably, but never delivered.

Q. Do you know the land in controversy?

A. I do.

Q. How long have you known it?

A. I have known it for thirteen or fourteen years.

Q. You know the city of Lawton?

A. Yes, sir.

Q. You know what its population was in June, 1910?

A. A little less than eight thousand.

Q. What is its population now?

A. I would say a little less than five.

Q. You remember what is known as the Gore addition?

A. I do.

Q. That comprises three hundred and twenty acres?

A. Yes.

Q. Do you know what other lands were platted at Lawton
109 as a part of the townsite at that time?

A. Yes.

Q. You may state as near as you can the quantity of land platted as townsites at that time.

A. My remembrance is that there was between—it was either forty or forty-four quarter sections of land platted at that time—the time of the passage of this act.

Q. And was there at that time any necessity for this land as a townsite?

A. Absolutely none.

Q. Is there now?

A. No.

Q. When in your judgment will this particular land in controversy be valuable as a townsite as it is now located?

A. When Lawton has a population of twenty-five thousand peop which will probably never occur.

Q. What is this land valuable for now?

A. To grow kaffir corn and cotton; it is high upland.

Q. If there wasn't any other land platted down there, would make a nice townsite?

A. Yes; if the town had been located there and there hadn't be a great many other quarter sections of land opened it would ha made a nice part of town.

Q. What in your judgment was the value of that land June 1 1910?

A. I would say seventy-five dollars an acre.

Q. What is its value now?

A. Thirty-five to forty dollars per acre. You see that was befo we had a series of drouths. We imagined it would grow anythin Since that time we have discovered we could only grow kaffir co and cotton and milo maize and very little of that.

Q. And in your judgment this land isn't valuable for townsite present?

A. No, sir; it has no townsite value.

By Mr. TAYLOR:

Q. This land wasn't included in that bill for the purpose of gro ing kaffir corn and cotton up there next to the city of Lawton, w it?

110 A. I don't quite catch your meaning, Mr. Taylor.

Q. Well, when the bill was promoted by you and Dr. Rowe wasn't it for the purpose of laying out an addition to the town s of Lawton, and was of great value, in which you were to receive interest.

A. No, sir.

Q. You know it was intended for town-site and addition pu poses, don't you?

A. I do not.

Q. You state to the jury that particular land was selected up ne the city of Lawton without any view of using it as an addition the town site?

A. It was selected principally by the doctor because it was the mo available quarter that could be had, and there was no thought at th time for town-site purposes.

Q. Most available quarter who had?

A. Of Government land that had been left unoccupied.

Q. There is Government land unappropriated that is farther o from the city of Lawton, isn't there?

A. Yes; but none closer except the piece Lieutenant Stecker r ferred to awhile ago that sold for seventy dollars an acre.

Q. This was land owned by the Government and wasn't a part the Indian reservation down there which was unallotted; that is co rect, isn't it?

A. Well, I am not sure of that, Mr. Taylor. It was either Government land or Indian land. I am not certain about it; are you?

Q. Well, do you know who picked out this particular quarter up there next to the city of Lawton?

A. Why, I think Dr. Rowell.

Q. You knew that an addition had been sold there at large figures, didn't you?

A. I knew that thirty or forty additions had been sold there.

Q. In 1910 Lawton was in a prosperous condition?

A. Just commencing to decline, which has continued from that time until this. It was probably at its most prosperous condi-
111 tion in 1908 and 9; then the decline commenced there and it has continued.

Q. Well, it was in pretty good condition in 1910, wasn't it?

A. We had already had one or two dry years—one dry year, I think, and possibly two. No, it wasn't in good condition. That's the year they burned the crops up in June. It was in very bad condition in 1910.

Q. Well, this matter was from April to June, wasn't it, before the crops had been burned up?

A. Which matter?

Q. The procuring of this enrollment? That was a matter in which the project covered the time from April—the passage of the act in April to the passage of the act in June, didn't it?

A. Well, I don't know about that.

Q. You went down and worked in connection with the passage of the act of June 17, 1910?

A. Yes; I was in Washington. I went to Washington about the first of June.

Q. Assisting Dr. Rowell in the passage of this act?

A. Yes, sir.

Q. Lawton has a large water supply out there at this dam and can be irrigated—this land around Lawton?

A. No; not at this time. They haven't sufficient water for the town and for Fort Sill.

Q. What?

A. The town is contemplating increasing the water supply for its own use now.

Q. Don't you know they are to raise the height of this dam so as to irrigate the valley below?

A. They are to raise the dam there from something like forty feet where it has a small basin of water to ninety feet, which vastly increases the holding capacity of the dam—increasing it many times. At this time there is not any water for irrigation purposes.

Q. They have got a lake there of about what dimensions at this time?

A. It is a small lake; probably seven to fifteen feet of water.

Q. About twelve hundred acres?

A. Oh, no.

Q. *Huch* much?

A. Oh, I don't know. I never measured it.

112 Q. Two or three miles long, isn't it?

A. I don't think so.

Q. How high is that dam there; do you know?

A. I think about forty feet.

Q. At places that lake is nearly that deep?

A. I judge immediately above the dam it would be that deep, b back a quarter of a mile above it probably run out to where it wou only be two or three feet deep. It slopes very rapidly.

Q. You know it is the biggest lake of water in the State of Okl homa, probably?

A. Oh, no; it isn't that.

Q. Where is any one larger?

A. Very much larger lakes of water. In Caddo County. There's number of larger lakes of water all up and down the Washita Riv and up and down the Green River and the Blue River.

Q. Can you name any one of them that is larger than the Lawto lake?

A. In Caddo County. I don't know——

Defendant objects; not cross-examination. Sustained.

Q. This piece of land lies up very close to the city of Lawto doesn't it?

A. It lies in about a mile of the center of town; mile and a half.

Q. The town, according to the last census, was about what pop lation?

A. 7,870.

Q. It is high and of high elevation just to the north and betwe the city and the fort?

A. This land? Yes. All the land is of high elevation ther Lawton, you know, is located on a hill.

Q. I didn't ask you that. I asked you if this particular lan wasn't of high elevation. Is that correct?

A. I am trying to explain to you——

Q. I am not asking you about other land now, but as to this lan

A. All of the land there is on the hill. There is none of Lawto land surrounding the bottom, you know.

Q. Well, there is lower land than this here.

113 A. In Cache Creek bottom, yes; and west and north an south. It's all high land.

Q. So, in your opinion, this land was only worth about seventy five dollars an acre June 17, 1910?

A. That it would sell for at that time; it wasn't worth it.

Q. How much was it worth?

A. Probably what it is worth now—thirty-five to fifty dollars.

Q. How many of you were employed down at Washington in th promotion of this bill?

A. Only myself.

Q. Yourself and Dr. Rowell?

A. Dr. Rowell had nothing to do. He wasn't employed. He was getting the land.

Q. He was there engaged in the passage of the bill?

A. He was there; yes.

Q. How long were you there?

A. I was there, I should say, a month and a half.

Q. This interest that went to your wife was in consideration of the services you performed in assisting——

A. No; my services there were in connection with a contract made with Dr. Rowell's father and brother. I had no contract with Dr. Rowell for any portion of the land. His father and brother were very wealthy Connecticut people and made the contract with me for cash to help him get the allotment.

Q. This transfer to your wife of an undivided half interest had nothing to do with your services in connection with the passage of the bill?

A. That was a later date. It had nothing to do with the services then rendered; the services were rendered under a contract for a cash payment.

Q. But under a later arrangement the consideration was for this deed to your wife for the services that you rendered in assisting in the passage of this bill?

A. Not altogether.

Q. Well, how much?

A. I don't remember now.

114 Q. You know how much actual consideration outside of these services in assisting in the legislation you got?

A. I don't remember.

Q. Don't remember any amount at all?

A. No; I don't.

Q. That was a part of the consideration as you remember it?

A. I didn't catch that, now.

Q. I say that was a part of the consideration—your services in assisting in passing this bill?

A. Settlement under the contract entered into between Dr. Rowell's father and brother and myself; yes.

Q. Relating to this matter?

A. Not relating to this matter. I had—it was a settlement they had with me. It was understood between us——

Q. What I am trying to get at, how much consideration for the transfer to your wife of that undivided half interest was the services that you performed?

A. I don't know.

Q. In assisting in the passing of the bill?

A. I don't know at this time.

Q. Don't know the valuation that was placed upon your servic
when this matter was finally settled up by the conveyance of an u
divided one-half interest?

A. Not at this time I don't.

Witness excused.

Defendant rests. Government rests. Testimony closed.

And the foregoing includes and contains all the evidence tendere
and all the evidence received upon the trial of said cause.

Thereupon the plaintiff and defendants submitted the followin
requested instructions, to wit:

115 In the United States District Court for the Western Distri
of Oklahoma.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JAMES F. ROWELL, MAUDE ROWELL, AND GEORGAE HAMON, defendants.
} No. 1120. At law

Instructions to jury.

And now comes the above-named defendants and respectfully as
the court to submit to the jury on behalf of the defendants the fo
lowing instructions as stating the law of this case:

I.

The court instructs the jury that the plaintiff, United States o
America, has failed to prove sufficient facts to entitled the said plain
tiff to a verdict against the said defendants, and you will, therefor
find for the defendants.

II.

The act of Congress approved April 4, 1910, which provided tha
"the Secretary of the Interior is hereby authorized and directed t
enroll and allot James F. Rowell, an intermarried member of th
Kiowa Tribe of Indians, who was regularly adopted by the tribe
council of aforesaid tribe previous to June 1st, 1909," was competen
to vest in the said James F. Rowell all of the rights of a Kiow
Indian, and entitled the said James F. Rowell to an allotment o
lands in the Kiowa, Comanche, and Apache Indian Reservatio
under act of Congress ratifying the agreement with the Kiowa
Comanche, and Apache Tribes of Indians, approved June 6, 190

III.

The court instructs the jury that the act of Congress approve
June 17, 1910, introduced in evidence, and which among othe
116 things provided: "That the Secretary of the Interior is hereb
authorized and directed to issue a patent in fee for the north

west quarter (¼) of section thirty (30), in township two (2) north, of range eleven (11) west, of the Indian meridian in Comanche County, Oklahoma, to James F. Rowell, a full member of the Kiowa, Comanche, and Apache Tribes of Indians in Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment," constituted a valid grant of the land described to the defendant, James F. Rowell, and vested in the said defendant, James F. Rowell, the full legal title to said lands; and the Secretary of the Interior could not prevent the vesting of the title to said lands in said defendant, James F. Rowell, by refusing to cause to be issued and delivered to said defendant a patent for said lands as directed by said act of Congress.

IV.

The court further instructs the jury that the demand and request of the said James F. Rowell for a patent from the Secretary of the Interior and the demand or request upon the Secretary of the Interior to cause such patent to be issued as an evidence of the legal title conveyed to the said James F. Rowell under said act of Congress approved June 17, 1910, constituted a sufficient acceptance of the grant to entitle the said James F. Rowell to said patent.

V.

The court further instructs the jury that the said act of Congress approved December 19, 1910, introduced in evidence by the plaintiff, is unconstitutional and void; that the title to said lands having vested in the said defendant, James F. Rowell, under the act
117 of Congress of June 17, 1910, aforesaid, it was beyond the power of the Congress of the United States to repeal said act and deprive the said defendant, James F. Rowell, of his right, title, and interest in and to said lands.

Which instructions numbered 1 to 5, inclusive, so tendered by the defendants were by the court refused, and the defendants duly excepted to the refusal of the court to give each and all of such instructions, and exceptions were by the court allowed.

And thereupon the court was requested, in writing, by the plaintiff to charge the jury as follows:

"First. You are instructed to return a verdict in favor of the plaintiff and against the defendants, and each of them, for the possession of the real property involved herein, to wit, the northwest quarter of section 30, township 2 north of range 11 west, of the Indian meridian, in Comanche County, Oklahoma."

Which said requested instruction the court did then and there refuse to give, to which ruling of the court the plaintiff duly excepted, and exception allowed.

And thereupon the court was requested, in writing, by the plaintiff to charge the jury as follows:

"Second. You are instructed that that part of the act of Congress approved June 17, 1910, involved herein, did not immediately upon the passage and approval thereof pass or grant title to the said northwest quarter of said section 30 to the defendant James F. Rowell; that under said act title to the land therein mentioned would not pass to the said Rowell until a patent in fee therefor was duly prepared according to law under the direction of the Secretary of the Interior and duly issued to the said James F. Rowell; and that such patent would not be duly issued until so prepared and delivered to the said Rowell and accepted by him in lieu of all claims
118 upon his part to any allotment of land or money settlement in lieu of an allotment."

Which said requested instruction the court did then and there refuse to give, to which ruling of the court the plaintiff duly excepted, and exception allowed.

And thereupon the court was requested, in writing, by the plaintiff to charge the jury as follows:

"Third. You are instructed that under the evidence in this case, and as a matter of law, the patent mentioned in said act of June 17, 1910, involved herein, never issued; and that it was competent for Congress to repeal said act prior to the preparation, delivery, and acceptance of said patent subject to said act; and that Congress did so repeal that part of the act of June 17, 1910, involved herein, by the act approved December 19, 1910, Public, No. 324 (36 Stat. L., 887)."

Which said requested instruction the court did then and there refuse to give, to which ruling of the court the plaintiff duly excepted, and exception allowed.

And thereupon the court was requested, in writing, by the plaintiff to charge the jury as follows:

"Fourth. You are instructed that the act of December 19, 1910, Public, No. 324 (36 Stat. L., 887), involved herein, was valid legislation by Congress and became effective and operated to and did repeal that part of the act of June 17, 1910, involved herein, and said act of December 19, 1910, became a law before the said act of June 17, 1910, had been carried out as to the issuance of a patent to said Rowell, and that neither the legal or equitable title to the land herein involved has ever passed to the said James F. Rowell, or to either or any of the defendants herein; and that such title still remains in the United States, and it is entitled to the possession of said land."

119 Which said requested instruction the court did then and there refuse to give, to which ruling of the court the plaintiff duly excepted, and exception allowed.

And thereupon the defendants again requested the court to instruct the jury to find a verdict for the defendants, which request the court

stated would be granted, and to which ruling of the court the plaintiff then and there duly excepted.

And thereupon the said court, of its own motion, did then and there charge the jury as follows, to wit:

"In my judgment the act of June 17, 1910, was designed to make a present grant of the title of this land to James F. Rowell, and in any event if there should be any question of that, that it did become so, upon the request which was made by him or in his behalf by his representative for the issuance of a patent by the honorable Secretary of the Interior."

To the giving of which charge and instruction the plaintiff then and there duly excepted.

And the said court did further charge the jury of its own motion as follows:

"The view of the court is simply that the title was granted by the act of June 17, 1910, or at least by acceptance, consisting of a request for the issuance of a patent thereunder, and that title being vested in James F. Rowell, it was as secure as any other property and that the title of Rowell cannot be constitutionally divested by the act of December 19, 1910."

To which said charge and instruction the plaintiff then and there duly excepted. And the said court did further charge the jury of its own motion:

120 "Since the court entertains that view, all of the testimony in the case which goes to no other subject than merely the acceptance of the grant contained in the act of June 17, 1910, is immaterial and is entitled to no weight in the determination of the case. The evidence was received largely upon a ruling that the decision upon it would be reserved. On account of the view which the court takes of the title, namely, that it was vested by present grant in the defendant, Rowell, and that it was not permissable to pass the repealing act—that is, it was ineffective to impair the title theretofore granted—there is only a question of law in the case, and decisions of questions of law belong to the court entirely, and the court takes the responsibility therefor."

To the giving of which said charge and instruction of the court the plaintiff then and there duly excepted.

And the said court did further charge the jury of its own motion, as follows:

"You are therefore directed, gentlemen, to return a verdict in favor of the defendants in this case."

To the giving of which said charge and instruction the plaintiff then and there duly excepted.

The entire charge of the court to the jury was as follows:

Gentlemen of the jury:

This is an ejectment case involving title to a quarter section of land in Comanche County, in this State. It was provided by an act

of Congress approved April 4, 1910, that the Secretary of the Interior is hereby authorized and directed to enroll and allot James F. Rowell, an intermarried member of the Kiowa Tribe of Indians, who was regularly adopted by the tribal council of the aforesaid tribe previous to June 1st, 1909. Later, on June 17, 1910, another act
121 was passed, to the effect that the Secretary of the Interior is hereby authorized and directed to issue patent in fee for the northwest quarter of section thirty, in township two north of range eleven west of the Indian meridian, to James F. Rowell, a full member of the Kiowa, Comanche, and Apache Tribes of Indians in Oklahoma, who has heretofore received no allotment of land from any source; this is to be in lieu of all claims of any allotment of land or money settlement in lieu of an allotment. By the act of December 19, 1910, providing—

"That so much of the proviso to section three of the act approved June seventeenth, nineteen hundred and ten, entitled 'An act to open to settlement and entry under the general provisions of the homestead laws of the United States certain lands in the State of Oklahoma, and for other purposes,' which proviso reads as follows: 'That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for northwest quarter of section thirty, township two north, range eleven west, Indian meridian, Comanche County, Oklahoma, to James F. Rowell, a full member of the Kiowa, Comanche, and Apache Tribes of Indians in Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment,' be, and the same is hereby, repealed,"

the act of June 17, 1910, was repealed, in so far as it authorized and directed the issuance of a patent for this land. In my judgment, the act of June 17, 1910, was designed to make a present grant of the title of this land to James F. Rowell, and in any event, if there should be any question of that, it did become so, upon the re-
quest which was made by him or in his behalf by his repre-
122 sentative for the issuance of a patent by the honorable Secretary of the Interior. The view of the court is simply that the title was granted by the act of June 17, 1910, or at least by acceptance, consisting of a request for the issuance of a patent thereunder, and that title being vested in James F. Rowell it was as secure as any other property, and that the title of Rowell cannot be constitutionally divested by the act of December 19, 1910. Since the court entertains that view all of the testimony in the case which goes to no other subject than merely the acceptance of the grant contained in the act of June 17, 1910, is immaterial and is entitled to no weight in the determination of the case. The evidence was received largely upon a ruling that the decision upon it would be reserved. On account of the view which the court takes of the title, namely, that it was vested by present grant in the defendant Rowell

and that it was not permissible to pass the repealing act—that is, it was ineffective to impair the title theretofore granted—there is only a question of law involved in the case, and decisions of questions of law belong to the court entirely and the court takes the responsibility therefor. You are therefore directed, gentlemen, to return a verdict in favor of the defendants in this case.

And thereupon the jury, in accordance with the direction of the court, returned a verdict in favor of the defendants.

And thereupon the plaintiff duly excepted to the verdict of the jury and exception allowed.

And thereupon the plaintiff filed, in writing, its motion for a new trial which is as follows:

Motion for new trial.

Comes now the plaintiff, the United States, and hereby makes application that the court vacate the verdict and judgment rendered and grant a new trial herein, and states that plaintiff is
123 aggrieved herein for the following causes, affecting materially the substantial rights of the plaintiff:

First. Irregularity in the proceedings of the court and orders made by it by which plaintiff was prevented from having a fair trial.

Second. Errors of law occur'ing at the trial and duly excepted to by plaintiff.

Third. That the verdict and judgment is not sustained by sufficient evidence, and is contrary to law.

And thereupon and upon said 6th day of July, 1914, the plaintiff's said motion for a new trial of said cause was overruled by the court, to which ruling of the court upon said motion the plaintiff at the time duly excepted.

And thereupon and on said 6th day of July, 1914, the court rendered final judgment in said cause as follows:

It is therefore considered, ordered, and adjudged by the court upon the verdict of the jury aforesaid that the said defendants are vested with the legal fee title to the lands in controversy herein, to wit, the northwest quarter (¼) of section number thirty (30) in township number two (2) north, of range number eleven (11) west of the Indian meridian in Comanche County, State of Oklahoma; and that the plaintiff has no title to said lands. It is further considered, ordered, and adjudged by the court that the plaintiff take nothing by this action.

To which said judgment of the court the plaintiff at the time duly excepted and still excepts.

And thereupon, upon application of the plaintiff and for good cause shown, the court granted ninety days from that date, to wit, July 6, 1914, within which plaintiff should make and file a bill of exceptions in said cause.

124 And thereafter and on the 3rd day of October, 1914, upon application of plaintiff and for good cause shown, and upon the minutes and proceedings of said court, it was duly ordered by the court that plaintiff have thirty days' additional time to that theretofore allowed in which to make, serve, and file its bill of exceptions herein.

And thereafter and on the 27th day of October, 1914, for good cause shown and upon the application of the plaintiff, it was duly ordered that plaintiff have sixty days' additional time to the time theretofore granted in which to make, serve, and file its bill of exceptions herein.

125 And now, in furtherance of justice and that right may be done, the plaintiff, the United States of America, presents the foregoing as and for its bill of exceptions in the above-entitled cause and prays that the same may be settled, allowed, signed, and filed as such.

ISAAC D. TAYLOR,
Asst. U. S. Atty., Attorney for Plaintiff.

The undersigned, Asp, Snyder, Owen & Lybrand, for and for and on behalf of James F. Rowell, Maud Rowell, and Georgae Hamon, defendants in the above-entitled cause, do hereby acknowledge service of the above and foregoing bill of exceptions this 19 day of December, 1914, and, having examined the same, does agree that the same is true and correct and that the same may be allowed, settled, signed, and filed and made a part of the record in said cause, and does hereby waive the right to be present at the settling and allowance of said bill of exceptions.

ASP, SNYDER, OWEN & LYBRAND,
Attorney for Defendants.

126 And thereupon and on the 26th day of December, 1914, upon due notice to the said James F. Rowell, Maude Rowell, and Georgae Hamon, defendants, and within the time limited and granted by the court therefor, the foregoing bill of exceptions is duly tendered by the United States of America, plaintiff, for signing, settlement, and allowance as the bill of exceptions in said cause, and the said plaintiff and defendants having agreed that the same is true and correct;

It is ordered that the above and foregoing be and the same is herewith duly signed, certified, and allowed as the bill of exceptions in said cause, and as being true and correct, and the same is hereby made a part of the record in said cause and ordered filed as such.

Done this 26th day of December, A. D. 1914.

JOHN H. COTTERAL,
District Judge, Trial Judge in said cause.

(Endorsed:) No. 1120. United States of America vs. James F. Rowell et al. Bill of exceptions. Filed Dec. 26, 1914. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

127 In the District Court of the United States for the Western District of Oklahoma.

UNITED STATES OF AMERICA, PLAINTIFF (PLAINTIFF IN error),
vs.
JAMES F. ROWELL, MAUDE ROWELL, GEORGAE HAMON, defendants.

Petition for writ of error.

Comes now the United States of America, by John A. Fain, United States attorney, and Isaac D. Taylor, assistant U. S. attorney, its attorneys, and shows that on the 6th day of July, at the June, 1914, term of said court, a final judgment was made, given, and entered in the above-entitled cause in favor of the defendants and against the plaintiff, and said plaintiff complains that in the record and proceedings had in said cause and also in the rendition of the judgment therein manifest error hath happened, to the great damage of the said plaintiff, as will appear in the assignment of errors herewith submitted.

And plaintiff further shows that in said cause and in the rendition of said final judgment therein the construction and application of the Constitution of the United States was and is involved, and the constitutionality under the Constitution of the United States of the act of Congress entitled "An act to repeal an act authorizing the issuance of a patent to James F. Rowell," approved December 19, 1910 (36 Statutes at Large, 887), was, and is, drawn in question, as more fully appears in the proceedings and record in said cause.

128 Wherefore, the United States of America prays that a writ of error may issue in this behalf, out of the Supreme Court of the United States, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and for such other orders and process as may be proper in the premises.

JOHN A. FAIN,
United States Attorney,
ISAAC D. TAYLOR,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

(Endorsed:) No. 1120. In the District Court of the United States for the Western District of Oklahoma. United States of America, plaintiff, vs. James F. Rowell, Maude Rowell, Georgae Hammon, defendants. Petition for writ of error. Filed Dec. 31, 1914. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

129 In the District Court of the United States for the Western District of Oklahoma.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* JAMES F. ROWELL, MAUDE ROWELL, AND GEORGAE HAMON, defendants.	No. 1120.	At Law.

Assignment of errors.

Comes now the plaintiff, the United States of America, in connection with and at the time of filing its petition for a writ of error to the Supreme Court of the United States and assigns the following errors, to wit:

1. The court erred in sustaining the objection of the defendants to the following question put to the witness Ernest Stecker, to wit:

Q. "And as of that date, what in your opinion was the value of the land in controversy?"

2. The court erred in finally, in effect, sustaining the motion of the defendants to strike out all of the testimony of the witness Ernest Stecker relating to the value of the land in controversy.

3. The court erred in permitting the defendant, James F. Rowell, over plaintiff's objection, to answer the following questions, and not striking the same from the evidence in the case.

Q. "Were you adopted as a member of the Kiowa, Comanche, and Apache Tribes of Indians? A. I was."

Q. "When was that? A. In 1909. 1909 or ten; I have forgotten those dates."

130 4. The court erred in refusing to give to the jury the instruction requested by the plaintiff which reads as follows:

"First. You are instructed to return a verdict in favor of the plaintiff and against the defendants, and each of them, for the possession of the real property involved herein, to wit, the northwest quarter of section 30, township 2 north of range 11 west of the Indian meridian, in Comanche County, Oklahoma."

5. The court erred in refusing to give to the jury the instruction requested by the plaintiff which reads as follows:

"Second. You are instructed that that part of the act of Congress approved June 17, 1910, involved herein, did not immediately upon the passage and approval thereof pass or grant title to the said northwest quarter of said section 30 to the defendant James F. Rowell; that under said act title to the land therein mentioned would not pass to the said Rowell until a patent in fee therefor was duly prepared according to law, under the direction of the Secretary of the Interior, and duly issued to the said James F. Rowell; and that such patent would not be duly issued until so prepared and delivered to the said Rowell and accepted by him in lieu of all claims upon his part to any allotment of land or money settlement in lieu of an allotment."

6. The court erred in refusing to give to the jury the instruction requested by the plaintiff which reads as follows:

"Third. You are instructed that under the evidence in this case, and as a matter of law, the patent mentioned in said act of June 17, 1910, involved herein, never issued, and that it was competent for Congress to repeal said act prior to the preparation, delivery, and acceptance of said patent, subject to said act; and that Congress did so repeal that part of the act of June 17, 1910, involved herein, by the act approved December 19, 1910, Public, No. 324 (36 Stat. L., 887)."

7. The court erred in refusing to give to the jury the instruction requested by the plaintiff which reads as follows:

"Fourth. You are instructed that the act of December 19, 1910, Public, No. 324 (36 Stat. L., 887), involved herein, was valid legislation by Congress and became effective and operated to and did repeal that part of the act of June 17, 1910, involved herein, and said act of December 19, 1910, became a law before the said act of June 17, 1910, had been carried out as to the issuance of a patent to said Rowell, and that neither the legal or equitable title to the land herein involved has ever passed to the said James F. Rowell, or to either or any of the defendants herein, and that such title still remains in the United States, and it is entitled to the possession of said land."

131 8. The court erred in giving the following in and as a part of its charge to the jury:

"In my judgment the act of June 17, 1910, was designed to make a present grant of the title of this land to James F. Rowell, and in any event, if there should be any question of that, that it did become so upon the request which was made by him or in his behalf by his representative for the issuance of a patent by the honorable Secretary of the Interior."

9. The court erred in giving the following in and as a part of its charge to the jury:

"The view of the court is simply that the title was granted by the act of June 17, 1910, or at least by acceptance, consisting of a request for the issuance of a patent thereunder, and that, title being vested in James F. Rowell, it was as secure as any other property, and that the title of Rowell can not be constitutionally divested by the act of December 19, 1910."

10. The court erred in giving the following in and as a part of its charge to the jury:

"Since the court entertains that view, all of the testimony in the case which goes to no other subject than merely the acceptance of the grant contained in the act of June 17, 1910, is immaterial and is entitled to no weight in the determination of the case. The evidence was received largely upon a ruling that the decision upon it would be reserved. On account of the view which the court takes of the title, namely, that it was vested by present grant in the defendant Rowell, and that it was not permissible to pass the repealing act—that is, it was ineffective to impair the title theretofore granted—there is only a question of law involved in the case, and

decisions of questions of law belong to the court entirely, and the court takes the responsibility therefor."

11. The court erred in giving the following in and as a part of its charge and direction to the jury:

"You are therefore directed, gentlemen, to return a verdict in favor of the defendants in this case."

12. The court erred in overruling plaintiff's motion for a new trial.

13. The court erred in directing the jury in said cause to return a verdict in favor of the defendants.

14. The court erred in rendering its judgment in said cause in favor of the defendants.

132 15. The court erred in its construction and application of the Constitution of the United States to said cause and the matters involved therein.

16. The court erred in its construction as to the validity of the act of Congress entitled "An act to repeal an act authorizing the issuance of a patent to James F. Rowell," approved December 19, 1910 (36 Statutes at Large, 887), and in holding the same to be invalid.

17. The court erred in holding, in effect, the said act of December 19, 1910 (36 Statutes at Large, 887), to be in contravention of the Constitution of the United States.

18. The court erred in refusing to instruct the jury to return a verdict in favor of the plaintiff and as against the defendants and each of them for the possession of the real property involved in said cause.

Wherefore the plaintiff prays that the judgment of the District Court may be reversed.

JOHN A. FAIN,
United States Attorney.
ISAAC D. TAYLOR,
Assistant U. S. Attorney,
Attorney for Plaintiff.

(Endorsed:) No. 1120. In U. S. District Court for Western District of Oklahoma. United States of America, plaintiff, vs. James F. Rowell, Maude Rowell, Georgae Hamon, defendants. Assignments of errors. Filed Dec. 31, 1914. Arnold C. Dolde, clerk; by M. V. Haws, deputy.

133 In the District Court of the United States for the Western District of Oklahoma.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JAMES F. ROWELL, MAUDE ROWELL, GEORGAE HAMON, defendants. } At law.

This 31st day of December, 1914, comes the plaintiff, the United States of America, by its attorneys, and files herein and presents to the court its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by it; praying also that

a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, the court does allow a writ of error.

JOHN H. COTTERAL,
United States District Judge for the Western District of Oklahoma.

Certificate of questions involved.

In the said cause of the United States of America, plaintiff, vs. James F. Rowell, Maude Rowell, and Georgae Hamon, defendants, I, John H. Cotteral, United States district judge for the Western District of Oklahoma, and the trial judge in said cause, do hereby certify that in said cause there was directly involved the construction and application of the Constitution of the United States, and that the constitutionality, under the Constitution of the United States, of the act of Congress entitled "An act to repeal an act authorizing the issuance of a patent to James F. Rowell," approved December 19, 1910 (36 Statute at Large, 887), was drawn in question.

Dated December 31st, 1914.

JOHN H. COTTERAL,
United States District Judge.

134 (Endorsed:) No. 1120. In U. S. District Court for the Western District of Oklahoma. United States of America, plaintiff, v. James F. Rowell, Maude Rowell, Georgae Hamon, defendants. Order allowing writ of error and certificate of question involved. Filed Dec. 31, 1914. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

135 In the District Court of the United States for the Western District of Oklahoma.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JAMES F. ROWELL, MAUDE ROWELL, GEORGAE HAMON, defendants.

In the above-entitled cause the plaintiff, the United States of America, gives notice of its election to make and file a transcript of record herein in the Supreme Court of the United States, to be printed under the supervision of its clerk and under its rules.

And the said plaintiff hereby designates the assignments of error and the entire record in said cause to be printed and included in said transcript.

JOHN A. FAIN,
United States Attorney.
ISAAC D. TAYLOR,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

We hereby accept service of the above this 1st day of January, A. D. 1915, and acknowledge receipt of a copy thereof.

ASP, SNYDER, OWEN & LYBRAND,
HENRY E. ASP,
Attorneys for Defendants.

(Endorsed:) No. 1120. In the District Court of the United States for the Western District of Oklahoma. United States of America, plaintiff, v. James F. Rowell, Maude Rowell, Georgae Hamon, defendants. Election and designation of transcript. Filed Dec. 31, 1914. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

136 UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

I, Arnold C. Dolde, clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the foregoing to be a full, true, and complete transcript of the pleadings, record, and proceedings in said court in case No. 1120, wherein the United States of America is plaintiff and James F. Rowell, Maude Rowell, and Georgae Hamon are defendants, as full, true, and complete as the said transcript purports to contain, and as called for by the election and designation for transcript of the record above set forth.

I further certify that the original writ of error and the original citation are hereto attached and returned herewith.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of Guthrie in said district this 25th day of January, A. D. 1915.

[SEAL.]

ARNOLD C. DOLDE,
Clerk United States District Court,
Western District of Oklahoma.
By M. V. HAWS, *Deputy.*

(Indorsement on back cover:) File No. 24544. W. Oklahoma, D. C. U. S. Term No. 800. The United States of America, plaintiff in error, vs. James F. Rowell, Maude Rowell, and Georgae Hamon. Filed February 1st, 1915. File No. 24544.

Supreme Court, U.
OF THE
OCT 30 1916
JAMES D. MAHER

No. 63.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

JAMES F. ROWELL, MAUDE ROWELL, AND GEORGIA HAMON.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF FOR THE UNITED STATES.

WASHINGTON
GOVERNMENT PRINTING OFFICE
1916

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The defendant attacks the constitutionality of the act of December 19, 1910. The statute was deliberately enacted by Congress to repeal a previous act of June 17, 1910, which earlier act a committee of the House of Representatives had found to have been secured by Rowell by misrepresentation and deception. The case involves the construction of the act of June 17, 1910, and the intent of Congress as to the vesting of rights thereunder. The familiar doctrines of this court as to holding acts of Congress unconstitutional only when no other action is possible, are peculiarly applicable in a case like this where no equities exist in behalf of the defendants	12
I. The act of June 17, 1910, did not of itself vest Rowell with title to the land. Prior to the issue of the patent therefor it was clearly within the power of Congress to pass the repealing act of December 19, 1910. Congress had power to change the form of investment of tribal property of one of its Indian wards; or, in fact, to lessen or abolish, amend or repeal his rights in tribal property; and until the actual legal title passed out of the United States by issue of the patent, Congress retained its power over the property of its Indian ward	15

II. The statute shows clearly that the intention of Congress was that title should not vest until the issue of the patent and its acceptance by Rowell; for the vesting of Rowell's title was to be conditional upon the revesting in the United States, as guardian of the property of the tribe, of Rowell's "Claims to allotments," etc. In order to revest the United States, Rowell must accept the patent when issued; no other act of less import by him would constitute a waiver or relinquishment by him of his claims 23

III. Even if the act of June 17, 1910, vested a legal or equitable title in Rowell, the repealing act of December 19, 1910, was not in violation of the fifth amendment; for the latter act took Rowell's land for the purpose of restoring it to an Indian reservation, i. e., for a public purpose; and since by the repeal Rowell received back, as compensation, the rights of allotment to which he was previously entitled as a Kiowa Indian, the taking of his land by the repealing act was not without just compensation 27

IV. The act of June 17, 1910, clearly did not vest legal title to the land in Rowell, and at the utmost his title was an inchoate or equitable interest, which, on his contention, he was entitled to have perfected by the issue of a patent to him. If this is so, Rowell's defense in this case sets up an equitable title against a suit at law in ejectment by the Government. Such an equitable title to land may not be set up or enforced in Federal courts as a defense in an action of ejectment 28

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

UNITED STATES OF AMERICA, PLAINTIFF IN error, *v.* JAMES F. ROWELL, MAUDE ROWELL, AND Georgae Hamon.	No. 63.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF FOR THE UNITED STATES.

THE FACTS.

This is an action in ejectment brought by the United States against the defendants in error to recover possession of a quarter section of land in the Western District of Oklahoma to which they claim title under an act of Congress approved June 17, 1910 (36 Stat. 534).

Dr. James F. Rowell, the principal defendant, is a physician, who removed from the East to Okla-

homa in 1899 (Rec. p. 49), and practiced his profession among the members of the Kiowa, Comanche, and Apache Tribes of Indians. He married into the Kiowa Tribe in 1903, was adopted as a member in 1909 or 1910 (Rec. p. 50), and by a provision contained in the Indian appropriation act of April 4, 1910 (36 Stat. 280), the Secretary of the Interior was " authorized and directed to enroll and allot " him as a member of the tribe. As a member of the tribe, he became entitled to certain rights like all the other Kiowa Indians: (*a*) The right to select an allotment; (*b*) the right to share in the distribution of a fund of $500,000, so far as it was then undistributed; (*c*) the right to be paid annually his *per capita* part of the interest on a certain fund of $1,500,000. See act of June 6, 1900, c. 813, section 6, Article II, Article III, Article V, Article VI (31 Stat. 677):

ARTICLE II.

> Out of the lands ceded, conveyed, transferred, relinquished, and surrendered by Article I hereof, and in part consideration for the cession thereof, it is agreed by the United States that each member of said Comanche, Kiowa, and Apache tribes of Indians over the age of eighteen (18) years shall have the right to select for himself or herself one hundred and sixty (160) acres of land to be held and owned in severalty, to conform to the legal surveys in boundary; * * *

ARTICLE III.

That in addition to the allotment of lands to said Indians as provided for in this agreement, the Secretary of the Interior shall set aside for the use in common for said Indian tribes four hundred and eighty thousand acres of grazing lands, to be selected by the Secretary of the Interior, either in one or more tracts as will best subserve the interest of said Indians. * * *

ARTICLE V.

When said allotments of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the allottees, respectively, for the period of twenty-five (25) years, in the time and manner and to the extent provided for in the act of Congress entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes," approved February 8, 1887, and an act amendatory thereof, approved February 28, 1891.

ARTICLE VI.

As a further and only additional consideration for the cession of territory and relinquishment of title, claim, and interest in and to the lands as aforesaid, the United States agrees to pay to the Comanche, Kiowa, and Apache Tribes of Indians, in the Indian Ter-

ritory, the sum of two million ($2,000,000) dollars, as follows: Five hundred thousand ($500,000) dollars to be distributed per capita to the members of said tribes at such times and in such manner as the Secretary of the Interior shall deem to be for the best interests of said Indians, which sum is hereby appropriated out of any funds in the Treasury not otherwise appropriated; and any part of the same remaining unpaid shall draw interest at the rate of five per centum while remaining in the Treasury, which interest shall be paid to the Indians annually per capita; and the remaining one million five hundred thousand ($1,500,000) dollars to be retained in the Treasury of the United States, placed to the credit of said Indians, and while so retained to draw interest at the rate of five per centum per annum, to be paid to the said Indians per capita annually.

By section 3 of the act of June 17, 1910, *supra*, it was provided:

> That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for northwest quarter of section thirty, township two north, range eleven west, Indian Meridian, Comanche County, Oklahoma, to James F. Rowell, a full member of the Kiowa, Comanche, and Apache Tribes of Indians of Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment.

The tract above described adjoins the town of Lawton, was formerly a part of the Kiowa, Comanche, and Apache Reservation, and was included in the special reservation for the Fort Sill Boarding School by order of the Secretary of the Interior dated June 20, 1901. (Rec. pp. 20, 21.) This land (being within a special Indian reservation) was land which, without the act of Congress, Rowell had no legal right to select for his allotment. This land also, it is to be noted, was to be patented to him "in lieu of all claims to any allotment of land or money settlement in lieu of an allotment."

On July 12, 1910, following the approval of the act of June 17, 1910, Messrs. Britton & Gray, attorneys for Rowell, addressed a letter to the Secretary of the Interior requesting the prompt issuance of the patent, saying that they understood that some objection had been interposed thereto, upon the ground that the land was very valuable. They suggested, however, that the act of June 17 was mandatory, leaving no discretion in the Secretary of the Interior, and urged that the patent be issued promptly. (Rec. p. 31.) In the meantime, on July 10, 1910, a letter had been sent to the Secretary of the Interior by Hon. Scott Ferris, the Representative from that congressional district, who stated that he and others living in the vicinity of the land felt that it was too valuable a tract for allotment purposes; that he feared "frankness was not afforded the Senators who helped to secure this

legislation"; and urged that the issue of the patent be witheld until Congress could be afforded an opportunity to take further action looking to a repeal of the law by which the allotment was authorized. (Rec. p. 33.)

Thereafter, similar requests were made by Senator Gore, of Oklahoma, and Representative Burke, of South Dakota, the latter then being chairman of the House Committee on Indian Affairs (Rec. pp. 32–33); and on November 9, 1910, the President addressed a letter to the clerk designated by him to sign land patents in the General Land Office, directing her to withhold the signing of the President's name to the patent "until Congress reassembles, in order that there may be opportunity for further consideration of the matter by that body, or until further orders or direction by me" (Rec. p. 35). In that letter the President stated that his action was taken upon the request and suggestion of the chairmen of the Senate and House Committees on Indian Affairs.

As early as June 22, 1910, only five days after the approval of the act, the Commissioner of ~~the General Land Office~~ Indian Affairs had, in a communication addressed to the Secretary of the Interior, recommended that a patent be issued to Dr. Rowell in accordance with the provisions of the act, and that recommendation had been approved by the Assistant Secretary of the Interior and referred to the Commissioner of the General Land Office. (Rec. pp. 58–59.) The officials of the latter office had begun the prepa-

ration of a patent, but it was not completed, and the partially finished form was finally destroyed (see testimony of Assistant Recorder O'Connell, Rec. pp. 26–27); and soon after Congress reconvened in the fall an act was passed on December 19, 1910, repealing so much of the act of June 17, 1910, as had authorized the issue of the patent (36 Stat. 887, Rec. p. 10). That act was passed after the House Committee on Indian Affairs, or a subcommittee thereof, had investigated the matter, held hearings, and taken testimony; and in the committee's report, which was based upon that investigation, it was stated that the Senate amendment to the act of June 17, 1910, which authorized the issue of the patent to Rowell—

> was concurred in by the House under a misapprehenson of the facts, in that it was assumed it was carrying out a provision already enacted in the Indian appropriation act and on the assumption that the land described was of no greater value than other lands that were subject to allotment.
>
> It developed, however, subsequent to the passage of the act of June 17, 1910, that instead of the land being average land of the average value of other tracts allotted to members of the Kiowa, Comanche, and Apache Tribe of Indians, which value is estimated to be about $3,500, it is a tract adjoining the city of Lawton, Okla., estimated to be worth from $30,000 to $100,000. It is apparent that had it been known at the time that the land was of such great value, the legislation

> directing that it be conveyed to Rowell would not have been enacted, and therefore the acts authorizing its conveyance should be repealed, and, in the opinion of the committee, there having been misrepresentation and deception practiced by the said James F. Rowell in securing the legislation contained in the act of June 17, 1910, the provision in the Indian appropriation act of April 4, 1910, authorizing his enrollment and adoption into the Kiowa Tribe should also be repealed * * * (H. Rept. No. 1741, 61st Cong., 3d sess., copy of which may be found in the hearings had before the Committee on Indian Affairs on H. R. 27400.)

Whatever may have been Rowell's views as to his rights in the case, or his intentions with respect of the land, he made no effort to take possession or to exercise any rights of ownership until about June 17, 1911—just one year after the enactment of the law which authorized the allotment of the land to him and about six months after that law had been repealed—when he commenced the erection of a house. (Rec. pp. 40–41.) He himself admits that he first made improvements on that date. Previous to that time the Government had used the land to graze Indian cattle (Rec. p. 40), and when the local representatives of the Indian Service learned that Rowell had begun to make improvements on the tract they served notice on him that he was a trespasser and ordered him to vacate immediately (Rec. p. 37). This he apparently refused to do,

as the record shows that he continued to make improvements. (Rec. p. 52.) The present suit was instituted by the Government for the purpose of securing his removal.

At the trial the Government developed through the testimony of J. L. Hamon, a witness for the defense and the husband of the defendant Georgae Hamon, that he had assisted Dr. Rowell in procuring the passage of the act which authorized the allotment of the land to the latter. (Rec. p. 63.) He was in Washington for that purpose about a month and a half, having a contract with Dr. Rowell's father and brother to " help him get the allotment." (Rec., p. 65.) Hamon testified that he was to receive a cash consideration for this service, but, when asked whether the deed for an undivided half interest which Rowell had given Hamon's wife was not intended as a consideration for his service in securing the passage of the act, replied that he could not remember. (Rec., p. 65.)

As stated above, the land in controversy adjoins the town or city of Lawton, and a witness for the Government testified that it had a value of $80,000. (Rec. p. 45.) Upon cross-examination he stated that the land was worth $10,000 for agricultural purposes. (Rec. p. 48.) Dr. Rowell testified that the land was chiefly valuable as an upland farm and worth about $50 an acre, which would be $8,000 for the entire tract. He admitted, however, on cross-examination that in the deed transferring the

half interest in the land to Georgae Hamon the consideration alleged was $50,000. (Rec. p. 57.) The other witness for the defense, J. L. Hamon, testified that in his judgment the land was worth $75 an acre in June, 1910, while he said it was worth, at the time of the trial, 1914, $35 to $40 an acre. (Rec. p. 62.)

Upon concluding the taking of the testimony the District Court instructed the jury to return a verdict for the defendants (Rec. p. 69), saying that the title to the land was granted Dr. Rowell by the act of June 17, 1910, or at least by Dr. Rowell's acceptance thereof, which was indicated by the request made upon the Secretary of the Interior for the issue of the patent and that thereafter Congress was without power to repeal the granting act (Rec. pp. 70–71).

A motion for a new trial was filed and overruled (Rec. p. 71), upon which the Government sued out this writ of error (Rec. p. 73) under the provisions of section 238 of the Judicial Code.

ASSIGNMENT OF ERRORS.

The District Court erred in holding that title to the land in controversy was vested in James F. Rowell by the act of June 17, 1910, or at least by his acceptance, which consisted of his request for a patent, and that the repealing act of December 19, 1910, was therefore unconstitutional.

THE GOVERNMENT'S CONTENTIONS.

The Government maintains that—

(1) The act of June 17, 1910, did not vest Rowell with immediate title to the land; that it was enacted in pursuance of the power of Congress to change the form of investment of Rowell's tribal property as one of the Kiowa Indians; that Congress retained control over this Indian's property until the patent actually issued; and that it was within the power of Congress to pass the repealing act of December 19, 1910, and thus preserve to him the previous rights of property which he held under the act admitting him as a member of the tribe.

(2) The act of June 17, 1910, contemplated a relinquishment of Rowell's claims to allotment of land under previous acts, for the act stated in terms that the patent was to be "in lieu of all claims to allotment, etc." Upon the vesting in Rowell of the title to the specific lot granted by the act, there was to be a devesting of his then existing rights, and the Government, as guardian of the Kiowa Indian property, was to be revested with Rowell's claims under the Kiowa Indian lands act of June 6, 1900. This concurrent vesting and devesting of title was intended by Congress to occur, and in the nature of things only could occur, upon the issue of the patent and its acceptance by Rowell. The patent never having been issued, no rights had vested in Rowell prior to the repealing act.

(3) Even if the act of June 17, 1910, vested title, either legal or equitable, in Rowell, the repealing

act of December 19, 1910, was not in violation of the Fifth Amendment; for the latter act took Rowell's land for the purpose of restoring it to an Indian reservation, i. e., for a public purpose; and since by the repeal Rowell received back as compensation the rights of allotment to which he was previously entitled as a Kiowa Indian, the taking of his land by the repealing act was not without just compensation.

(4) The act of June 17, 1910, clearly did not vest legal title to the land in Rowell, and at the utmost his title was an inchoate or equitable interest which, on his contention, he was entitled to have perfected by the issue of a patent to him. If this is so, Rowell's defense in this case sets up an equitable title against a suit at law in ejectment by the Government. Such an equitable title to land may not be set up or enforced in Federal courts as a defense in an action at law of ejectment.

ARGUMENT.

THE DEFENDANTS ATTACK THE CONSTITUTIONALITY OF THE ACT OF DECEMBER 19, 1910. THE STATUTE WAS DELIBERATELY ENACTED BY CONGRESS TO REPEAL A PREVIOUS ACT OF JUNE 17, 1910, WHICH EARLIER ACT A COMMITTEE OF THE HOUSE OF REPRESENTATIVES HAD FOUND TO HAVE BEEN SECURED BY ROWELL BY MISREPRESENTATION AND DECEPTION. THE CASE INVOLVES THE CONSTRUCTION OF THE ACT OF JUNE 17, 1910, AND THE INTENT OF CONGRESS AS TO THE VESTING OF RIGHTS THEREUNDER. THE FAMILIAR DOCTRINES OF THIS COURT AS TO HOLDING ACTS OF CONGRESS UNCONSTITUTIONAL, ONLY WHEN NO OTHER ACTION IS POSSIBLE, ARE PECULIARLY APPLICABLE IN A CASE LIKE THIS, WHERE NO EQUITIES EXIST IN BEHALF OF THE DEFENDANTS.

The defense interposed to the Government's suit in ejectment is the alleged unconstitutionality of the

act of Congress of December 19, 1910, and is based upon the defendants' construction of the previous act of June 17, 1910, viz, that it is either (*a*) a grant *in praesentŭ* vesting legal title, or (*b*) that it is a conditional grant which became vested upon its acceptance by Rowell through his action in applying for the issue of the patent.

As to such a defense, the following cardinal principles of law are applicable in this case:

An act of Congress is not to be held unconstitutional except in the clearest case.

Parsons v. *Bedford* (1830), 3 Pet. 433, 448, 449.
Hooper v. *California* (1895), 155 U. S. 648, 657.
United States v. *Jin Fuey Moy* (1916), 241 U. S. 394, 401.

If an act is susceptible of two constructions, one of which will render it constitutional, that construction is to be adopted if possible which will render it free from constitutional objection.

Grenada County Supervisors et al. v. *Brogden* (1884), 112 U. S. 261, 268, 269.
Plymouth Coal Co. v. *Pennsylvania* (1914), 232 U. S. 531, 546.

Any doubts as to the intention of the Government in an act granting land are to be resolved in its favor.

Charles River Bridge v. *Warren Bridge* (1837), 11 Pet. 420, 545, et seq.

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Dubuque & Pacific R. R. v. *Litchfield* (1859), 23 How. 66, 88.

Rice v. *Railroad Co.* (1861), 1 Black. 358, 379, 380.

"Every act of Congress making a grant is to be treated both as a law and a grant, and the intent of Congress when ascertained is to control in the interpretation of the law. * * * In order to determine the intent of Congress we must look at the situation at the time the act was passed."

Wisconsin Central R. R. v. *Forsythe* (1895), 159 U. S. 46, 55.

Missouri, Kansas & Texas R. R. Co. v. *Kansas Pacific R. R. Co.* (1878), 97 U. S. 491, 497.

Nothing short of a vested right in the land could deprive Congress of the right which it has as owner and holder of the legal title to dispose of the territory or other property of the United States.

Frisbie v. *Whitney* (1869), 9 Wall. 187, 192.

Clearly, Dr. Rowell has no equities to support his claim. He and his agent, J. L. Hamon (to whose wife Rowell gave a deed for one-half of the land) evidently imposed upon the committees of Congress, and induced them to recommend the enactment of a law authorizing the issue to him of a patent for a tract of land which Congress supposed to be of no extraordinary value, while, in fact, it was worth many thousand dollars. For reasons already stated the issue of the patent was withheld, and as soon as Congress reconvened it revoked its previous

action. In the meantime Dr. Rowell had done nothing looking to the improvement of the land and had incurred no expense in that regard. He did not even attempt to take possession until a year after the act of June 17, 1910, was passed, and nearly six months after that law had been repealed; and even then he was promptly warned that he was a trespasser. What he did after that was done at his own risk and with full knowledge of the Government's claims.

I.

THE ACT OF JUNE 17, 1910, DID NOT OF ITSELF VEST ROWELL WITH TITLE TO THE LAND. PRIOR TO THE ISSUE OF THE PATENT THEREFOR, IT WAS CLEARLY WITHIN THE POWER OF CONGRESS TO PASS THE REPEALING ACT OF DECEMBER 19, 1910. CONGRESS HAD POWER TO CHANGE THE FORM OF INVESTMENT OF TRIBAL PROPERTY OF ONE OF ITS INDIAN WARDS; OR, IN FACT, TO LESSEN OR ABOLISH, AMEND OR REPEAL, HIS RIGHTS IN TRIBAL PROPERTY; AND UNTIL THE ACTUAL LEGAL TITLE PASSED OUT OF THE UNITED STATES BY ISSUE OF THE PATENT, CONGRESS RETAINED ITS POWER OVER THE PROPERTY OF ITS INDIAN WARD.

Until the actual issue of the patent under the act of June 17, 1910, Congress had entire power to vary the form of the property rights of this tribal Indian, Rowell, unless upon the enactment of the statute itself Rowell acquired a vested right.

Choate v. *Trapp* (1912), 224 U. S. 665, 678.

"With the exception of a few cases nothing but a patent passes a perfect and consummate title. The class of cases to be excepted is where an act of Congress grants land, as is sometimes done in words of present grant." (*Wilcox* v. *Jackson* (1839), 13 Pet. 498, 516; *Carter* v. *Ruddy* (1897),

166 U. S. 493, 495.) Grants by act of Congress are, however, the exceptional mode of passing title out of the United States Government, and the intention to make a grant *in praesenti* must be indicated in the statute by the use of appropriate language, and the statute must clearly indicate a purpose to vest an immediate title *proprio vigore.*

" Wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the Government until the issue of the patent." (*Michigan Land & Lumber Co.* v. *Rust* (1897), 168 U. S. 589, 593.)

Of the class of statutes containing words importing a grant *in praesenti,* there are examples in the long line of cases involving railroad grants where the words used are " there be, and hereby is, granted," followed by a direction to issue a patent. In these cases, the Court has found an intent of Congress that a vested interest should pass; that the words " import a grant *in praesenti* "; that " the title transferred is a legal title, as distinguished from an equitable title or inchoate interest "; and that the provision for a patent is merely to secure evidence; (*Deseret Salt Co.* v. *Tarpey* (1891), 142 U. S. 241, and cases cited; see also the class of cases of present grant represented by *Stoddard* v. *Chambers* (1844), 2 How. 284, 316, 317. *Langdeau* v. *Hanes* (1874), 21 Wall. 521.)

The statute now in controversy contains no such words of grant, but merely contains an authorization and direction to the Secretary of the Interior

to issue a patent. In such a case, the test is, to use the words of the *Deseret Salt Co. case:* Do or do not the terms used in the act of Congress " exclude the idea that they are to be treated as words of contract or promise rather than * * * as words indicating an immediate transfer of interest "?

Tested by this rule, the act of June 17, 1910, which directs the Secretary of the Interior to issue a patent " in lieu of all claims to any allotment of land," falls short of constituting a completed grant, in view of the fact that Congress was dealing with a change of the form of investment of tribal Indian property, and in further view of the fact that in the statute the words directing the issue of the patent were followed by the words, " *this* to be in lieu of all claims to any allotment of land," etc.

By the act of April 4, 1910, Dr. Rowell was recognized as a member of the tribe and the Secretary of the Interior was authorized to enroll and allot him as such. The allotments had been made for nearly 10 years when Dr. Rowell became a member, and necessarily he was entitled only to what Congress in its generosity saw fit to give him. There was no obligation resting upon Congress to recognize Dr. Rowell as a member of the Kiowa Tribe, or to bestow upon him an allotment of land for which the United States had already paid the Indians who constituted the tribe in 1900. But by the act of April 4, 1910, he became entitled to select an allotment of 160 acres, if it could be found, and

to share in the money to which the members of the Kiowa Tribe were entitled under the act of June 6, 1900. Upon this allotment, when selected by him, Rowell would receive a document known as a trust patent (not a patent in fee simple) such as had been given to other allottees. But it is fair to assume that Dr. Rowell, an educated white man, did not wish to take a trust patent; and in 1910 the land remaining subject to selection for allotment was of little value. Consequently, Congress, by the act of June 17, 1910, changed its mind as to tribal property which should go to Rowell, and provided a substitute for his other tribal claims by directing the issue of a patent to him for a tract of land that had hitherto been reserved for Indian school purposes (Rec. p. 20), and which in the absence of special authority from Congress could not be allotted (31 Stat. 678, Art. III).

Congress has frequently seen fit to change plans previously agreed upon in regard to the distribution of lands to its Indian wards. And, as was held in *Lone Wolf* v. *Hitchcock* (1903), 187 U. S. 553, 568, relating to the very act of June 6, 1900, respecting the Kiowa lands here involved:

> "Full administrative power was possessed by Congress over Indian tribal property," and "the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who * * * were in substantial effect the wards of the Government."

Special attention must be paid to the fact that Congress was under no obligation to grant Rowell anything. He was an Indian ward admitted to this tribe long after the original grants to the tribe and long after the original distribution of the funds, the original selection of the allotments and the *per capita* division of the income. Whatever Congress now gave to Rowell might reduce by just that amount the property of other earlier members of the tribe. In other words, Congress's power over the tribal property so far as admitting Rowell to any share therein was plenary. (*Gritts* v. *Fisher* (1912), 224 U. S. 640, 642, 648; *Cherokee Nation* v. *Hitchcock* (1902), 187 U. S. 294, 307; *Stephens* v. *Cherokee Nation* (1899), 174 U. S. 445, 488.)

The act of June 17, 1910, must be construed, therefore, in the light of these conditions. It was a gratuity; it contained a direction to the Secretary of the Interior which was in the nature of a gratuitous promise to Rowell that a patent should be issued to him. Congress did not intend, however, to relinquish its power over this land which, be it noticed, was part of a special reservation for Indian schools, or to relinquish its right to change the form of property of its Indian ward, until the patent should actually have issued. Before the patent issued, the promise was withdrawn and the statute making it repealed by the act of December 19, 1910. The act of June, 1910, was not a contract conveying a vested right, but " only an act of Congress and can have no greater effect." (*Gritts* v.

Fisher (1912), 224 U. S. 640, 648.) It was a statute passed in the exercise of its powers over its Indian lands and Indian wards. The repealing statute, therefore, as was said in *Slidell* v. *Grandjean* (1884), 111 U. S. 412, 440, "is not to be regarded as the revocation of a grant, but as a declaration that the promised donation will not be made."

A case which seems to be in point is *Levey* v. *Stockslager* (1888), 129 U. S. 470. The statute there involved was a special act of March 2, 1867 (14 Stat. 635), as follows:

> That there be, and hereby is, confirmed to Mary Elizabeth Bouligny, Corrine Bouligny, and Felice Bouligny, widow and children of John E. Bouligny, deceased, the one-sixth part of the land claim of Jean Antoine Bernard D'Autrive, in the State of Louisiana, said one-sixth part amounting to seventy-five thousand eight hundred and forty acres; and that, inasmuch as the said land embraced in said claim have (has) been already appropriated by the United States to other purposes, certificates of new location, in eighty-acre lots, be issued to the said Mary Elizabeth Bouligny, for her own benefit and that of her said minor children in lieu of said lands, to be located at any land office in the United States, upon any public lands subject to private entry at a price not exceeding one dollar and twenty-five cents per acre. The Commissioner of the General Land Office is hereby directed to issue said certificates of new location in accordance with existing regulations in such cases.

Subsequently a joint resolution was adopted by Congress March 30, 1867, directing the Secretary of the Interior to suspend the execution of the act until the further order of Congress, and no further order was thereafter made. March 6, 1867, four days after the enactment of the original statute, the beneficiaries requested the Commissioner of the General Land Office to issue the certificates. This the commissioner refused to do, and an appeal was taken to the Secretary of the Interior, who approved the commissioner's action.

After stating that no title to the land was carried by the act of March 2, 1867, the Court said this:

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> Nor did the act of March 2, 1867, give to the widow and children of Bouligny a vested right in the certificates of new location which were to be issued. No certificates were prepared for issue; no step was taken by the Commissioner of the General Land Office toward issuing them; no new lands were selected or located; and the whole thing remained *in fieri* and subject to the control of Congress.

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> Inasmuch as nothing had been done by the officers of the Land Department under the act of March 2, 1867, and no certificates had been made out, and the whole matter still remained executory, no vested right had attached at the time of the approval of the joint resolution. Therefore, that resolution did not deprive the widow and children of

> any property or right of property in violation of the Constitution. The transaction was merely the ordinary one of a direction by statute to a public officer to perform a certain duty, and a subsequent direction to him by statute, before he had performed that duty or had entered upon its performance, not to perform it.

The statute in the *Levey Case* confirmed the land claim and in express terms directed the Commissioner of the General Land Office to issue to the beneficiaries certificates of new location for the specified quantity of land, the sole act remaining to be done being merely the ministerial act of issuing the certificates. In this case, the statute directed the Secretary of the Interior to issue the patent for a specified tract of land. If Congress could lawfully repeal the statute authorizing the issue of the certificates in the *Levey Case,* there seems to be no reason for denying it such authority in the case at bar.

Just as the joint resolution of March 30, 1867, deprived the widow and children of Bouligny of no vested right, so the repealing act of December, 1910, deprived Dr. Rowell of no vested right. It did not alter his status as a full member of the Kiowa Tribe of Indians. It merely provided that he should not receive title to a certain tract of land which had been offered to him six months before, but which had in fact never been actually conveyed to him, nor of which had he ever taken possession or even made any effort so to do.

II.

THE STATUTE SHOWS CLEARLY THAT THE INTENTION OF CONGRESS WAS THAT TITLE SHOULD NOT VEST UNTIL THE ISSUE OF THE PATENT AND ITS ACCEPTANCE BY ROWELL; FOR THE VESTING OF ROWELL'S TITLE WAS TO BE CONDITIONAL UPON THE REVESTING IN THE UNITED STATES, AS GUARDIAN OF THE PROPERTY OF THE TRIBE, OF ROWELL'S "CLAIMS TO ALLOTMENTS," ETC. IN ORDER TO REVEST THE UNITED STATES, ROWELL MUST ACCEPT THE PATENT WHEN ISSUED; NO OTHER ACT OF LESS IMPORT BY HIM WOULD CONSTITUTE A WAIVER OR RELINQUISHMENT BY HIM OF HIS CLAIMS.

The effect of the act of June 17, 1910, was to change Rowell's status by authorizing the issue to him of a patent to a specific tract of land. When the statute, after directing the issue of the patent, further provided, "*this* to be in lieu of all claims to allotment of land," etc., it clearly indicated that it was the patent which was to be "in lieu of all claims," and that the patent was not to be delivered or to have force as vesting title unless Rowell should accept it upon the terms offered.

In other words, Congress extended to Rowell the privilege of accepting this land in lieu of his other claims. Until such acceptance, he acquired no vested right. The act of June 17, 1910, contemplated substantially the same situation as the Curtis Act of June 28, 1898, which provided that "the acceptance of his patent by said allottee shall be operative * * * as a relinquishment of all his right, title, and interest in and to any and all parts thereof excepting the land embraced in said patent." In *Choate* v. *Trapp* (1912), 224 U.S. 665, 672,

it was held that under such a statute the Indian became vested with all the rights conveyed by the patent, upon delivery of the patent to him and acceptance of the benefit of the conveyance. Of course, where the right to a patent has once become vested, it is equivalent, so far as the Government is concerned, to a patent actually issued (*Simmons* v. *Wagner* (1879), 101 U. S. 260); but no vested right, either legal or equitable, in public lands can be acquired as against the United States until all the prerequisites for the acquisition of title have been complied with (*Shepley* v. *Cowan* (1875), 91 U. S. 330, 338; *Campbell* v. *Wade* (1889), 132 U. S. 34).

And where payment is to be made to the Government for the land, either in cash or by relinquishment of claims to the land, no such equitable title vests until such payment or relinquishment occurs. See *Benson Mining Co.* v. *Alta Mining Co.* (1892), 145 U. S. 428, 432.

In the case at bar, title evidently did not pass upon enactment of the statute, for Rowell by its terms must in some way relinquish his other claims in exchange for the specific land granted. The transaction was duplex, contemplating not only a vesting of lands in Rowell but a revesting in the United States, as guardian of the Kiowa tribal property, of Rowell's claim to allotment in other Kiowa lands, etc. It was an exchange between

the parties. As was said in *Lessieur* v. *Price* (1851), 12 How. 60:

> A concurrent vestiture of title must have occurred. The injured land must have vested in the United States at the same time that the title was taken by the new location. It was intended to be an exchange between the parties, and the inquiry arises, When did the United States take title? (Page 73.)

So, in the case at bar, when the statutes provided that the patent be issued to Rowell, " this in lieu of all claims to any allotment, etc.," the question is: When was it the intention that the claims belonging to Rowell should vest in the United States and the title to the land vest in Rowell?

What action of Rowell should be sufficient and formal to constitute a relinquishment of his claims and a revesting of the same in the United States? Clearly, the mere application for the issue of the patent made by his attorneys, Britton & Gray, can not constitute such a formal relinquishment of his claims as to revest title thereto in the United States. For in the first place there is nothing in the record to show that Messrs. Britton & Gray (who were merely attorneys at law) had authority as attorneys in fact to relinquish Rowell's claims. And, in the second place, a mere application for the patent did not bar him from later withdrawing his application prior to the issue of the patent. By applying for issue of the patent, Rowell was not precluded from

changing his mind and declining to relinquish his claims and to accept the land before patent should issue.

In this case, the defendants and the court below construed the statute as a conditional grant, but held that mere application by Rowell for the issue of the patent satisfied the condition. The Government contends that the wording of the statute itself shows that nothing short of the issue of the patent and its acceptance by him should constitute, within the purview and intent of the statute, the vesting of his title and the revesting in the United States of title to his other claims; and that it was clearly the issue of the patent and its acceptance by Rowell which the statute contemplated as the definite time at which the mutual vesting of title and revesting of claims should take place.

There being two constructions of the statute possible, this is peculiarly a case in which this Court should apply the familiar doctrine relative to Government statutory grants, well expressed in *Slidell* v. *Grandjean* (1884), 111 U. S. 412, 437, that

> Where a statute operates as a grant of public property to an individual or the relinquishment of a public interest and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the Government rather than that of the individual.

III.

EVEN IF THE ACT OF JUNE 17, 1910, VESTED A LEGAL OR EQUITABLE TITLE IN ROWELL, THE REPEALING ACT OF DECEMBER 19, 1910, WAS NOT IN VIOLATION OF THE FIFTH AMENDMENT; FOR THE LATTER ACT TOOK ROWELL'S LAND FOR THE PURPOSE OF RESTORING IT TO AN INDIAN RESERVATION, I. E., FOR A PUBLIC PURPOSE; AND SINCE BY THE REPEAL, ROWELL RECEIVED BACK, AS COMPENSATION, THE RIGHTS OF ALLOTMENT TO WHICH HE WAS PREVIOUSLY ENTITLED AS A KIOWA INDIAN, THE TAKING OF HIS LAND BY THE REPEALING ACT WAS NOT WITHOUT JUST COMPENSATION.

Even if this Court shall determine that a legal or equitable title actually vested in Rowell on the enactment of the act of June 17, 1910, the Government contends that the repealing act of December 19, 1910, will still be valid. The intent, purpose, and effect of the latter act was to restore this tract to the status it previously occupied as a part of the special Indian school reservation, out of which it had been carved for Rowell by the act of June 17, 1910. In other words, the United States by the later act of December 19, 1910, took the land for a public use. The taking, however, was not "without just compensation," and was not in violation of the Fifth Amendment; for the very repealing act which constituted the taking, by necessary implication and effect, restored to Rowell all the rights and claims to allotment of land which he possessed prior to the act of June 17, 1910, as a member of the Kiowa tribe.

Clearly, it was just compensation to grant back to Rowell in December the same property rights which had been taken from him in June, in compensation for the specific land granted to him in June

and now taken from him; or at least the burden was upon Rowell in this case to prove that the compensation so restored to him was not just.

IV.

THE ACT OF JUNE 17, 1910, CLEARLY DID NOT VEST LEGAL TITLE TO THE LAND IN ROWELL, AND AT THE UTMOST HIS TITLE WAS AN INCHOATE OR EQUITABLE INTEREST WHICH, ON HIS CONTENTION, HE WAS ENTITLED TO HAVE PERFECTED BY THE ISSUE OF A PATENT TO HIM. IF THIS IS SO, ROWELL'S DEFENSE IN THIS CASE SETS UP AN EQUITABLE TITLE AGAINST A SUIT AT LAW IN EJECTMENT BY THE GOVERNMENT. SUCH AN EQUITABLE TITLE TO LAND MAY NOT BE SET UP OR ENFORCED IN FEDERAL COURTS AS A DEFENSE IN AN ACTION OF EJECTMENT.

The defendants in their answer set up a legal title in Rowell. (Rec. p. 6.) But when the statute itself directed that a patent be issued, " this to be in lieu of all claims, etc.," it is clear that whatever inchoate vested rights Rowell acquired (and the Government, of course, denies that he acquired any vested right at all until after issue of the patent and its acceptance by him), such rights were not legal but equitable. There are no words of grant *in præsenti* in the statute, on which the contention can be founded that immediately upon enactment of the statute the fee simple legal title was vested in Rowell.

The incomplete measures taken in the Interior Department in the preparation of the patent (Rec. pp. 58, 59, 22, 23, 24, 27) did not vest any legal title in Rowell. The patent was, in fact, never signed or completed in the manner set forth in *United States* v. *Schurz* (1880), 102 U. S. 378.

While, by performance of all the requisite actions, a man may secure "a vested interest in the property and a right to a patent therefor" (*Cornelius* v. *Kissel* (1888), 128 U. S. 456, 461), and while the Government may thereafter "hold the legal title in trust for him" (*Orchard* v. *Alexander* (1895), 157 U. S. 372, 383), nevertheless a vested right acquired in this way constitutes simply an equitable title; and even if this Court should find that the defendant here had acquired such an equitable title (which the Government, of course, denies), the Government contends that such an equitable title may not be set up in the present action at law in ejectment.

The present action was begun February 3, 1913, and therefore before the passage of the act of March 3, 1915 (38 Stat. 956), which permitted equitable defenses to be pleaded at law. The Federal rule is stated in *Foster* v. *Mora* (1878), 98 U. S. 425:

> In actions of ejectment in the United States courts the strict legal title prevails. If there are equities which would show the right to be in another, these can only be considered on the equity side of the Federal courts.

Johnson v. *Christian* (1888), 128 U. S. 374, 382:

> * * * in the United States courts a recovery in ejectment can be had upon the strict legal title only, and that a court of law will not uphold or enforce an equitable title to land as a defense in such action.

See also *Lockhart* v. *Johnson* (1901), 181 U. S. 516, 529.

CONCLUSION.

We submit that the action of the district court should be reversed and the cause remanded for the entry of judgment in ejectment in favor of the plaintiff.

CHARLES WARREN,
Assistant Attorney General.
S. W. WILLIAMS,
Attorney.

OCTOBER, 1916.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 63.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR.

vs.

JAMES F. ROWELL, MAUD ROWELL, AND GEORGAE HAMON, DEFENDANTS IN ERROR.

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

February 3, 1913, the plaintiff in error as plaintiff filed in the District Court of the United States for the Western District of Oklahoma, its petition against the above named defendants. (Printed Record, pages 2 and 3.)

The petition was an ordinary petition in ejectment to recover possession of the northwest quarter section thirty, township two north, range eleven west of the Indian meridian in Comanche County, Oklahoma.

On the first day of April, 1913, the defendants filed their answer to the petition of the plaintiff (Printed Record, pages 4 to 7 inc.), first denying the title of the plaintiff or that it is the owner in fee of said lands; denying that the plaintiff is entitled to possession of said real property or any part there-

of; and denying that defendants have unlawfully kept the plaintiff out of the possession of said real estate or any part thereof; and averring that the said defendants have been in the lawful possession of said lands since the 17th day of June, 1910, continuously; and denying that the plaintiff has been damaged in any sum.

SECOND.

For a second defense the said defendants answer as follows:

"And for a second and further defense to the petition of the plaintiff filed herein the defendants say:

That the defendant, Maud Rowell, is the wife of the above named James F. Rowell, and resides with the said defendant, James F. Rowell, on the land above described.

That the Congress of the United States, by an act entitled 'An act making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June 30th, 1911,' approved April 4, 1910, 36 U. S. statutes at Large, part 1, page 280, duly enacted and provided as follows:

'The Secretary of the Interior is hereby authorized and directed to enroll and allot James F. Rowell, intermarried in the Kiowa Tribe of Indians, who was regularly adopted by the tribal council of aforesaid tribe previous to June first, nineteen hundred and nine.'

That from said date the said defendant, James F. Rowell, became and continued to be recognized by the United States to be a full member of the Kiowa Tribe of Indians entitled to be enrolled and to receive an allotment of lands as a member of said tribe, and to all the benefits accruing to the members of said Kiowa Tribe of Indians; and then and there and thereby the defendant, James F. Rowell, became entitled to an allotment of one hundred and sixty (160) acres of land as a member of said tribe, or a money settlement in lieu of such allotment.

The defendants further say that the said defend-

ant, James F. Rowell, never at any time prior to June 17, 1910, received such allotment of lands from the Government of the United States or any money settlement in lieu of such allotment as a member of said Kiowa Tribe of Indians, or otherwise.

That on said date the Congress of the United States by an act entitled 'An act to open to settlement and entry, under the general provisions of the homestead laws of the United States, certain lands in the State of Oklahoma, and for other purposes,' approved June 17, 1910, and by section three of said act among other things, duly enacted and provided as follows:

'That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for northwest quarter of section thirty, township two north, range eleven west, Indian Meridian, Comanche County, Oklahoma, to James F. Rowell, a full member of the Kiowa, Comanche and Apache Tribes of Indians of Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment.'

That said defendant, James F. Rowell, immediately upon the passage and approval of said act, duly accepted the same and the provisions thereof, and requested the Secretary of the Interior to cause to be issued and delivered to him, the said James F. Rowell, a patent for said lands as commanded and directed by the said act of Congress aforesaid.

That the said defendant, James F. Rowell, has never received from the Government of the United States any allotment of lands or money settlement in lieu of an allotment of lands as a member of the Kiowa, Comanche, and Apache Tribes of Indians, or otherwise.

That the said defendant, James F. Rowell, immediately upon the passage and approval of said act of Congress, duly entered into the possession of said lands, and has erected valuable improvements thereon, and has erected a house and barn and other buildings thereon, and has fenced and otherwise improved the said tract of land, and since the 17th day of June, 1910, has continuously resided upon said tract of land with his wife,

the defendant, Maud Rowell, and his family, consisting of five children.

"That by the said act of Congress the said plaintiff, the Government of the United States, duly conveyed and transferred to the defendant, James F. Rowell, the legal title to the land above described; that ever since the said grant and conveyance of the said lands to the said defendant, James F. Rowell, by the act of Congress aforesaid, the said defendant has been with his said family in actual possession and occupancy of said lands."

The defendants further say:

"That immediately upon the passage and approval of said act of Congress aforesaid, approved June 17th, 1910, the Hon. Secretary of the Interior, by order, duly caused to be executed by the proper officers of the Land Department, in the name of the President of the United States of America, a patent for said lands in obedience to the command of said act of Congress; and that said patent was duly entered of record in the proper department office of the United States, as provided by the rules and regulations and laws of the United States.

"That the Hon. Secretary of the Interior wrongfully, and without right or authority, withholds the said patent from this defendant James F. Rowell, and said defendants aver that the legal title to said described tract of land duly passed from the United States to and vested in the said defendant, James F. Rowell, under said act of Congress; and the said Secretary of the Interior, by withholding the delivery of said patent, merely withholds from said defendant the further and convenient evidence of said title.

"That the said act of Congress and the acceptance thereof by the defendant, James F. Rowell, constitutes an executed contract by and between the said defendant, James F. Rowell, and the Government of the United States, by which the legal title to said real estate passed to and vested in said defendant, James F. Rowell, and, except as hereinafter stated, the said defendant, James F. Rowell, still owns, holds, and possesses the said legal title.

"That on the 3rd day of November, 1911, the said defendant, James F. Rowell, and his wife, the defendant, Maud Rowell, duly executed, acknowledged, and delivered to their codefendant, Georgae Hamon, a deed of general warranty, conveying to her, the said Georgae Hamon, an undivided one-half interest in and to the said real estate; and that said defendant, Georgae Hamon, and defendants, James F. Rowell and his said wife, Maud Rowell, ever since have been in the open, actual, and exclusive possession of the said real estate; and that the said defendants, James F. Rowell, and the said Georgae Hamon, at the time of the commencement of this action, had and held and now have and hold the full legal title thereto.

Wherefore the defendants demand judgment that the plaintiff take nothing by its action herein and for their costs in this behalf expended."

The plaintiff on the 21st day of May, 1913, filed its reply (printed record, pages 8 to 11 inc.), which is practical admission of the allegations of the answer admitting the passage of the act of Congress of April 4, 1910, and of June 17, 1910, and avers a repeal of said act of June 17, 1910, by an act of Congress approved December 19, 1910, and further alleging that the grant of June 17, 1910, was a mere gratuity and further that the value of the grant was in excess of the fair value of the allotment rights of each member of the Kiowa, Comanche and Apache Tribes of Indians under their agreement with the United States.

To this reply the defendants, on the 6th day of July, 1914, by leave of court filed their rejoinder (printed record, pages 15 and 16), which rejoinder is as follows, to-wit:

"And now comes the above-named defendants, and for their rejoinder to the reply of the plaintiff filed herein the said defendants say:

"They deny each and every allegation in said reply contained and set forth, except such as admit allegations made in the answer of the defendants filed herein, and except such as are hereinafter specifically admitted; and said defendants allege and aver the fact to be that the said act of Congress alleged and set forth in said fourth paragraph of the said reply of the said plaintiff, being

'An act to repeal an act authorizing the issuance of a patent to James F. Rowell, approved December 19, 1910,' Public, Number 324, 36 U. S. Stat., page 887, as set forth in the said fourth paragraph of said reply, is unconstitutional and invalid in this, to-wit, that the said act of Congress is a violation of the fifth amendment to the Constitution of the United States, which among other things provides: 'That no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation,' and the said defendants allege and aver the fact to be that the said act of Congress, if enforced, will deprive these defendants of their property without due process of law, and will take the property of these defendants for public use without just compensation, and these defendants invoked on their behalf the protection of said provisions of the Constitution of the United States.

"Wherefore these defendants pray judgment against the plaintiff in their third answer filed herein is prayed."

On July 6, 1914, the said cause was tried to a jury and the court in effect directed the jury to return their verdict for the defendant (printed record pages 16-17).

The plaintiff filed its motion for a new trial on the same day (printed record page 18).

The bill of exceptions contains the evidence introduced at the trial and is found in the printed record at pages 19 to 66 inclusive, and the instructions of the court are found in the printed record at pages 66 and 67.

The defendants tendered to the court requests for instructions one to five, inclusive, found at pages 66 and 67 of the printed record, which the court declined to give. The court was requested by the plaintiff to instruct the jury, and the actions of the court thereon is found in the printed record at pages 67 and 68, as follows:

"And thereupon the court was requested, in writing, by the plaintiff to charge the jury as follows:

'First. You are instructed to return a verdict in favor of the plaintiff and against the defendants, and

each of them, for the possession of the real property involved herein, to-wit, the northwest quarter of section 30, township 2 north of range 11 west, of the Indian Meridian, in Comanche county, Oklahoma.'

Which said requested instruction the court did then and there refuse to give, to which ruling of the court the plaintiff duly excepted, and exception allowed.

And thereupon the court was requested, in writing, by the plaintiff to charge the jury as follows:

'Second. You are instructed that that part of the act of Congress approved June 17, 1910, involved herein, did not immediately upon the passage and approval thereof pass or grant title to the said northwest quarter of said section 30 to the defendant James F. Rowell; that under said act title to the land therein mentioned would not pass to the said Rowell until a patent in fee therefor was duly prepared according to law under the direction of the Secretary of the Interior and duly issued to the said James F. Rowell; and that such patent would not be duly issued until so prepared and delivered to the said Rowell and accepted by him in lieu of all claims upon his part to any allotment of land or money settlement in lieu of an allotment.'

Which said requested instruction the court did then and there refuse to give, to which ruling of the court the plaintiff duly excepted and exception allowed.

And thereupon the court was requested, in writing, by the plaintiff to charge the jury as follows:

'Third. You are instructed that under the evidence in this case, and as a matter of law, the patent mentioned in said act of June 17, 1910, involved herein, never issued; and that it was competent for Congress to repeal said act prior to the preparation, delivery, and acceptance of said patent subject to said act; and that Congress did so repeal that part of the act of June 17, 1910, involved herein, by the act approved December 19, 1910, Public, No. 324 (36 Stat., L., 887).'

Which said requested instruction the court did then and there refuse to give, to which ruling of the court the plaintiff duly excepted, and exception allowed.

And thereupon the court was requested, in writing, by the plaintiff to charge the jury as follows:

'Fourth. You are instructed that the act of December 19, 1910, Public, No. 324 (36 Stat. L., 887) involved herein, was valid legislation by Congress and became effective and operated to and did repeal that part of the act of June 17, 1910, involved herein, and said act of December 19, 1910, became a law before the said act of June 17, 1910, had been carried out as to the issuance of a patent to said Rowell, and that neither the legal or equitable title to the land herein involved has ever passed to the said James F. Rowell, or to either or any of the defendants herein; and that such title still remains in the United States, and it is entitled to the possession of said land.'

Which said requested instruction the court did then and there refuse to give, to which ruling of the court the plaintiff duly excepted, and exception allowed."

And the defendants renewed their request to the court to instruct the jury to find a verdict for the defendants, which request the court stated would be granted (printed record pages 68-69), and thereupon the court instructed the jury as follows (printed record 69 to 71 inc.):

"This is an ejectment case involving title to a quarter section of land in Comanche county, in this state. It was provided by an act of Congress approved April 4, 1910, that the Secretary of the Interior is hereby authorized and directed to enroll and allot James F. Rowell, an intermarried member of the Kiowa tribe of Indians, who was regularly adopted by the tribal council of the aforesaid tribe previous to June 1, 1909. Later, on June 17, 1910, another act was passed, to the effect that the Secretary of the Interior is hereby authorized and directed to issue patent in fee for the northwest quarter of section 30, in township 2 north of range 11 west of the Indian Meridian, to James F. Rowell, a full member of the Kiowa, Comanche and Apache tribes of Indians in Oklahoma, who has heretofore received no allotment of land from any source; this is to be in lieu of all claims of any allotment of land or money settlement in lieu of an allotment. By the act of December 19, 1910, providing—

'That so much of the proviso to section 3 of the act approved June 17, 1910, entitled "An act to open to settlement and entry under the general provisions of the homestead laws of the United States certain lands in the State of Oklahoma, and for other purposes," which proviso reads as follows: "That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for northwest quarter of section 30, township 2 north, range 11 west, Indian Meridian, Comanche County, Oklahoma, to James F. Rowell, a full member of the Kiowa, Comanche, and Apache tribes of Indians in Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment," be and the same is hereby repealed,' the act of June 17, 1910, was repealed, in so far as it authorized and directed the issuance of a patent for this land. In my judgment, the act of June 17, 1910, was designed to make a present grant of the title of this land to James F. Rowell, and in any event, if there should be any quesion of that, it did become so, upon the request which was made by him or in his behalf by his representative for the issuance of a patent by the honorable Secretary of the Interior. The view of the court is simply that the title was granted by the act of June 17, 1910, or at least by acceptance, consisting of a request for the issuance of a patent thereunder, and that title being vested in James F. Rowell it was as secure as any other property, and that the title of Rowell cannot be constitutionally divested by the act of December 19, 1910. Since the court entertains that view all of the testimony in the case which goes to no other subject than merely the acceptance of the grant contained in the act of June 17, 1910, is immaterial and is entitled to no weight in the determination of the case. The evidence was received largely upon a ruling that the decision upon it would be reserved. On account of the view which the court takes of the title, namely, that it was vested by present grant in the defendant Rowell, and that it was not permissible to pass the repealing act—that is, it was ineffective to impair the title theretofore granted—there is only a question of law involved in the case, and decisions of questions of law belong to the court

entirely and the court takes the responsibility therefor. You are therefore directed, gentlemen, to return a verdict in favor of the defendants in this case.

"And thereupon the jury, in accordance with the direction of the court, returned a verdict in favor of the defendants.

"And thereupon the plaintiff duly excepted to the verdict of the jury and exception allowed."

The proceedings of the court as appears from the Journal printed record pages 16-17), is as follows:

"JOURNAL ENTRY.

Now, on this 6th day of July, A. D. 1914, the same being one of the regular judicial days of the June, 1914, term of this court, this cause comes regularly on for hearing, the plaintiff appearing by Isaac D. Taylor, United States district attorney, and W. B. Herod, assistant United States district attorney, and H. E. Bretschneider, special assistant United States attorney, and the said defendants appearing by Asp, Snyder, Owen and Lybrand, their attorneys;

And thereupon the said defendants asked and obtained leave to file their rejoinder to the reply of the plaintiff, and leave is given to said defendants to file such rejoinder without prejudice to the assignment of said cause for trial, which is accordingly done.

And thereupon the said plaintiff and the defendants each respectively announce themselves ready for trial.

And thereupon comes a jury of twelve good and lawful men, who are duly selected, empanelled, and sworn to try the issues in said cause.

And thereupon the respective parties make to the jury a statement of their case.

And thereupon the said plaintiff introduces its testimony and rests its case.

And thereupon the said defendants introduce their testimony and rest their case.

And thereupon the plaintiff requests in writing that the court charge the jury as set forth in the proposed instructions numbered 'first' to 'fourth,' inclusive, sub-

mitted by plaintiff, but each and all of said requests by plaintiffs are, by the court, refused, to each and all of which refusals the plaintiff duly excepts, and the said defendants requested the court, in writing, to instruct the jury to find a verdict for the defendants, which request of the said defendants is granted by the court, to which the plaintiff duly excepts.

And thereupon the said jury, by the direction of the court, returns to the court their verdict for the defendants.

And thereupon the said plaintiff files instanter its motion to set aside the verdict of the jury herein and to grant to the plaintiff a new trial herein, which motion is considered by the court, and the court finds that the said motion should be overruled.

It is therefore considered, ordered, and adjudged by the court that the motion of the said plaintiff to set aside the verdict of the jury herein and to grant to the plaintiff a new trial herein be, and the same is hereby overruled, to which ruling of the court the said plaintiff duly excepted and still excepts.

And thereupon the court finds that the said defendants are entitled to judgment herein as against the plaintiff upon the verdict of the jury herein.

It is therefore considered, ordered, and adjudged by the court, upon the verdict of the jury aforesaid, that the said defendants are vested with the legal fee title to the lands in controversy herein, to-wit:

The northwest quarter (NW¼) of section number thirty (30) in township number two (2) north of range number eleven (11) west of the Indian Meridian, in Comanche County, State of Oklahoma; and that the plaintiff has no title to said lands.

It is further considered, ordered, and adjudged by the court that the said plaintiff take nothing by this action, and to said judgment of the court the plaintiff at the time duly excepted and still excepts.

And thereupon the said plaintiff asks and is granted ninety days from this date within which to make and file a bill of exceptions herein.

Dated July 6, 1914.

O.K. JOHN H. COTTERAL, *Judge.*

ISAAC D. TAYLOR,

U. S. Atty. for Pltff.

HENRY E. ASP."

It appears from the testimony that Dr. James F. Rowell had lived in the Kiowa, Comanche, and Apache country since 1899; that he was a practicing physician; a graduate of an accredited medical school; had lived amongst the Indians and served them as a physician without compensation for ten or twelve years.

Act of Congress of April 4, 1910, 36 Statutes at Large, Part one, page 280, is as follows:

> "The Secretary of the Interior is hereby authorized and directed to enroll and allot James F. Rowell, intermarried in the Kiowa tribe of Indians, who was regularly adopted by the tribal council of aforesaid tribe, previous to June 1, 1909."

From and after the passage of said Act, the defendant James F. Rowell, as alleged, became and continued to be a full member of the Kiowa tribe of Indians.

By Act of Congress approved June 17, 1910, by section three of said Act, 36 Statutes at Large, Part one, page 533, it is provided as follows:

> "That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for the northwest quarter of section 30, township 2 north, range 11 west of the Indian Meridian, Comanche County, Oklahoma, to James F. Rowell, a full member of the Kiowa, Comanche and Apache tribe of Indians of Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of any claims to any allotment of land or money settlement in lieu of an allotment."

After the passage of Act of June 17, 1910, to-wit on June 22, 1910, an order was issued to the Commissioner of the General Land Office for the issuance of the patent. Defendants Exhibit One. Printed record pages 58-59, is as follows, to-wit:

"Address only the Commissioner
of Indian Affairs.
CRW
JFA
Refer in reply to the following:
Land Sales—
50888-1910 Defendant's Ex. 1.
Patent in Fee.

Department of the Interior.
Office of Indian Affairs. ESS
Washington, June 22, 1910.

The honorable the Secretary of the Interior.

SIR: Section 3 of the Act entitled 'An Act to open to settlement and entry under the general provisions of the homestead laws of the United States certain lands in the State of Oklahoma, and for other purposes' (Public, No 215), approved June 17, 1910, provides:

That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for NW¼ of sec. 30, T. 2 N., R. 11 W., Indian Meridian, Comanche County, Oklahoma, to James F. Rowell, a full member of the Kiowa, Comanche and Apache tribes of Indians in Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment.

In accordance with the part of section 3 above quoted, it is respectfully recommended that the Commissioner of the General Land Office be directed to issue a patent in fee to James F. Rowell for the NW¼ of sec. 30, T. 2 N., R. 11 W., Indian Meridian, Oklahoma, containing 160 acres. When issued it should be sent to this office for delivery.

Very respectfully,
R. G. VALENTINE, *Commissioner.*

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June 22, 1910.

Approved and referred to the Commissioner of the

General Land Office for action in accordance with the foregoing recommendations.

JESSE E. WILSON,
Assistant Secretary.

W. C. P."

It appears from testimony of Mr. Rowell (printed record page 50 et seq.) that he has been an intermarried citizen of the Kiowa tribe since 1903; that he has four children by his Indian wife; and had four children by her on June 17, 1910; that he had been living with his Indian wife in the tribe since 1903; that he had received no allotment of land nor money settlement in lieu of such allotment before or since the passage of the Act of April 4, 1910;

At page 51 et seq. the witness testifies:

"Q. Do you remember of the passage of the Act of June 17, 1910?

A. I do.

Q. Authorizing and directing the Secretary of the Interior to make—to issue a patent in fee for this land?

A. Yes, sir.

Q. Did you ever receive that patent?

A. No.

Q. Did you ever make any request for that patent?

A. Yes, sir.

Q. When and where?

A. During the latter part of June and the month of July, 1911, I made several trips to—

Q. 1910, do you mean?

A. Yes, 1910.

Q. Right immediately after the passage of the Act?

A. Yes.

Q. How soon after the passage of the Act did you make a request?

A. Three or four days, I think.

Q. Did you make repeated requests?

A. Yes.

Q. At the office of the Secretary of the Interior?

A. Yes; though not in person there.

Q. Well, did you go in person—
A. Yes; I went in person—
Q. To the office of the Secretary of the Interior? What response did you get?
A. If I would go in the morning, I was told to come in the afternoon and the patent would be delivered to me; if I went in the afternoon, I was told to come in the morning.
Q. Did you make repeated requests for it?
A. Yes, sir.
Q. Did you afterwards employ, Britton & Gray, Washington, D. C.?
A. Yes.
Q. Did you authorize them to make a request or demand for a patent on your behalf?
A. Yes.
Q. You were in Washington at the time of the passage of the Act?
A. Yes.
Q. When did you come home from Washington; after the passage of the Act?
A. Well, I don't remember the day of the month. It was in July, sometime following this.
Q. Did you do anything toward taking possession of the land?
A. I went on the place; went over it and selected a building site.
Q. When was that?
A. That was shortly after my return from the east. I don't remember the date.
Q. Sometime in July?
A. Some time in July—the early part of August. I am not sure of the date.
Q. When did you, in fact, commence your building?
A. June 17, 1911.
Q. What improvements did you put on there?
A. On that day I simply built the house.
Q. What improvement have you on it now?
A. I have a house, chicken house, barn about 18 by 70 feet, and have fenced it and cross-fenced it. I have dug a well and built a tank.

Q. Have you reduced any of it to cultivation?
A. Have over a hundred acres in cultivation now.
Q. Were any improvements on the place when you commenced to build?
A. Yes; there was a fence on the west and south side.
Q. You now have it fenced all around?
A. And cross-fenced.
Q. And you have dug wells?
A. Yes.
Q. Since the passage of that Act of June 17, 1910, have you ever received from the government of the United States any allotment of land?
A. No.
Q. Any other land, or have you ever had any money settlement in lieu of any allotment of land?
A. No.
Q. Have you or not always claimed this land since the Act of June 17, 1910?
A. I have.
Q. And have never had any other allotment or settlement?
A. No.
Q. From the government?
A. No."

And at page 31 of the record appears a demand on behalf of Mr. Rowell for patent to this land made by Britton & Gray, which is as follows:

"BRITTON & GRAY,
Attorneys and Counsellors at Law.
Glover Building, 1419 F. Street, NW.
Alex. B) Washington, D. C. July 12, 1910.

Hon. Secretary of the Interior,
Washington, D. C.

Sir: In the Act of Congress approved April 4, 1910, in section 18, the Secretary of the Interior was thereby 'authorized and directed to enroll and allot James F. Rowell, intermarried in the Kiowa tribe of Indians, who was regularly adopted by the tribal council of aforesaid tribe previous to June 1, 1909.'

"In the Act of Congress approved June 17, 1910, under section 3, it was provided, 'That the Secretary of the

Interior is hereby authorized and directed to issue a patent in fee for the NW¼ of sec. 30, Tp. 2 N., R. 11 W, Indian Meridian, Comanche County, Oklahoma, to James F. Rowell, a full member of the Kiowa, Comanche and Apache tribes of Indians of Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of all claims to any allotmnet of land or money settlement in lieu of an allotment.

In behalf of the aforesaid James F. Rowell we respectfully ask the prompt issuance of patent for the land described. We do not believe it requires any argument of citation of authorities to demonstrate to you that the Act of June 17, 1910, is manadatory in its terms and leaves no discretion to you. We understand that inquiry has been made in respect to the value of this land and some objection interposed to the issue of a patent on the ground of its value. Manifestly the question of value is entirely outside any possible issue that can be determined by your department. The land was land of the United States, subject to the disposition of Congress, and Congress has directed that it be patented to James F. Rowell. Whether it be worth $100.00 or $100,000.00 cannot possibly affect the result, and whilst we have been entirely willing that the department should make inquiries as it deemed proper, either as to the value of the land or the condition under which the legislation was enacted, we are of opinion that a sufficient time has elapsed to have obtained all desired information and know of nothing which has been said or offered to in any way justify the refusal to issue the patent. We therefore ask prompt issue of patent, and if for any reason you are of opinion that you are not justified in issuing the same, that you may state your conclusion to that effect, so that James F. Rowell may proceed with such remedy as he may properly possess.

Very respectfully,

BRITTON & GRAY,
Attys. for James F. Rowell."

The testimony of J. L. Hamon at page 60 to 62 inclusive which is uncontradicted, discloses the fact that at all times since the laying out of the original townsite of Lawton there was absolutely no possibility of any value to this land for townsite purposes.

BRIEF AND ARGUMENT.

I.

STATUTES AND SUGGESTIONS.

The Kiowa, Comanche and Apache agreement approved June 6, 1900, 31 U. S. Stat. at Large, page 676 et seq., provides for the opening to settlement of the lands occupied by the Kiowa, Comanche and Apache tribes of Indians and for an allotment to the members of those tribes of portions of said lands.

By Article V of said agreement, 31 U. S. Stat. at Large, page 678, it is provided as follows:

> "When said allotments of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the alottees, respectively, for the period of twenty-five (25) years, in the time and manner and to the extent provided for in the Act of Congress entitled 'An Act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and territories over the Indians, and for other purposes,' approved February 28, 1887, and an act amendatory thereof, approved February 28, 1891.
>
> "And at the expiration of the said period of twenty-five (25) years the titles thereto shall be conveyed in fee simple to the allottees or their heirs, free from all incumbrances."

Section 5 of the Act of Congress approved February 8, 1887, therein refered to, being 24 U. S. Stat. at Large, page 389, so far as it relates to the allotment of lands to Indians, is as follows:

> "Sec. 5. That upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the

state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void";

The Act of Congress approved February 28, 1891, referred to in said Article V of the Kiowa, Comanche and Apache agreement does not contain any provision of importance here.

The Kiowa, Comanche and Apache agreement is only of importance here as it furnishes the predicate for the subsequent legislation actually involved in this controversy.

The agreement together with the surrounding circumstances, the services of Dr. James F. Rowell to the Kiowa tribe of Indians and his intermarriage in that tribe, form the reasons for the passage of the Act of April 4, 1910. 36 U. S. Stat. at Large, page 280, and the proviso to the Act of Congress approved June 17, 1910, 36 U. S. Stat. at Large, page 533.

The Act of April 4, 1910, 36 U. S. Stat. at Large, page 280, is as follows:

"The Secretary of the Interior is hereby authorized and directed to enroll and allot James F. Rowell, intermarried in the Kiowa tribe of Indians, who was regularly adopted by the tribal council of aforesaid tribe previous to June 1, 1909."

The Act of June 17, 1910, 36 U. S. Stat. at Large, page 533, being proviso to section 3 of said Act at page 534, is as follows:

"That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for the northwest quarter of section thirty, township two north, range eleven west of the Indian Meridian, Comanche County, Oklahoma, to James F. Rowell, a full member of the Kiowa, Comanche and Apache tribe of Indians of Okla-

homa, who has heretofore received no allotment of land from any source; this to be in lieu of any claims to any allotment of land or money settlement in lieu of an allotment."

By the third assignment of error the plaintiff in error alleges error in the admision of testimony of Dr. Rowell as to when he was adopted into the Kiowa, Comanche and Apache tribe of Indians.

The state of the printed record, pages 49-50, is as follows:

"Q. Were you adopted as a member of the Kiowa, Comanche and Apache tribe of Indians?

A. I was."

There was no objection to this question. The objection comes to the next question:

"Q. When was that?

A. 1909 or 1910, I have forgotten those dates."

Here the government objects and asks that the answer be stricken out as not the best evidence and calls for a legal conclusion. The answer itself shows that the answer is immaterial and could not in any way influence the mind of the court or jury if it was error, which we assert it was not.

The Act of Congress of April 4, 1910 recites the fact and provides: "The Secretary of the Interior is hereby authorized and directed to enroll and allot James F. Rowell, *intermarried in the Kiowa tribe of Indians, who was regularly adopted by the tribal council aforesaid previous to June 1, 1909.*" So that the fact of the adoption was recognized and admitted by the Congress and the date fixed prior to June 1, 1909.

This leads us to the real question involved in this case,—the proper construction and legal effect of the Acts of Congress on which the title of these defendants is based.

The Act of Congress of April 4, 1910, is, in its terms, mandatory.

The Secretary of the Interior by the Act is directed *to enroll and allot James F. Rowell.* From that minute James F. Rowell became entitled to all the benefits of a member of the Kiowa tribe under the Kiowa, Comanche and Apache agreement.

Under the Kiowa, Comanche and Apache agreement certain white persons who were not members of the tribe were some of them granted full rights as members of the tribe and

others limited rights only. See Article X Kiowa, Comanche and Apache agreement, 31 U. S. Stat. at Large, page 679.

The power of the Congress to deal with this subject is not and cannot be questioned.

The Act of April 4, 1910 stands unassailed and unassailable and no effort is made by the plaintiff in error to assail the Act.

The Act of June 17, 1910, is also mandatory in its terms. It provides:

> "The Secretary of the Interior is hereby authorized *and directed to issue a patent in fee* for the NW¼ of section 30, township 2 north range 11 west Indian Meridian Comanche County, Oklahoma, to James F. Rowell a full member of the Kiowa, Comanche and Apache tribe of Indians of Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment."

To aid in arriving at a proper construction of the acts of Congress referred to, and especially the effect of the act of June 17, 1910, and what rights were vested under the act in Rowell, it is respectfully suggested:

(a) By the use of the words, "Authorized and Directed" it is plain that the Secretary of the Interior was not vested with any discretion. The use of the words, "Directed to issue" is a mandatory provision requiring the secretary to make the necessary order to the proper officers of the land department to make the patent in the name of the President according to custom and departmental rules, it being well understood that a direction to the secretary to issue a patent is merely a direction that he shall put the machinery in motion to cause a proper patent to be issued.

The direction being mandatory and no discretion vested in the secretary to select the lands to be conveyed, there was nothing for the secretary to do, except to perform the ministerial act and cause the patent to be issued as a convenient evidence and proof of the title already conveyed by the act.

This the secretary did when he directed the Commissioner of the General Land Office to cause the patent to be issued (printed record pages 58-59).

(b) By the said act of Congress of April 4, 1910, the Secretary of the Interior "was authorized and *directed* to

enroll and *allot* James F. Rowell, intermarried in the Kiowa tribe of Indians, who was regularly adopted by the tribal council of aforesaid tribe previous to June 1, 1909."

Under this act Rowell was entitled to an allotment and all the rights of a member of the Kiowa tribe of Indians.

The act of June 17, 1910, recites that the grantee James F. Rowell "who has heretofore received no allotment of land from any source or money settlement in lieu of an allotment."

(c) The act of Congress of June 17, 1910, takes away from the Secretary of the Interior the right to select and the right to make the allotment. The act itself makes a grant in lieu of an allotment direct to James F. Rowell of the land described, describing him as a full member of the Kiowa, Comanche and Apache tribes of Indians of Oklahoma.

It therefore appears from the face of the legislation that the grant was not a gratuity. It is based upon full consideration and was a grant to him in lieu of any claim to an allotment of land or money settlement in lieu of an allotment.

(d) The act does away with the issuance of a trust patent under Article V of the agreement between the Kiowa, Comanche and Apache tribes of Indians and the United States, ratified by act of Congress approved June 6, 1900, which, it appears from the act of June 17, 1910, the Secretary of the Interior had never made, as the act recites that the grantee has received no allotment.

(e) The Secretary of the Interior by refusing to issue the patent, could not deprive the grantee of his right to the land and the title vested a fee simple title, that being the title granted by the act, that the Secretary of the Interior was directed to evidence by patent.

(f) There being nothing left to be determined by the Secretary of the Interior, and no discretion vested in him by the act, his duties under the act and law and departmental regulations are purely ministerial.

(g) The duties imposed on the Secretary of the Interior being ministerial, his refusal to perform the ministerial duty could not affect the grant or avoid it.

(h) No duties except ministerial duties being by the act imposed upon the Secretary of the Interior, the words used and direction contained in the act, constitute a grant.

(i) The acceptance of the grant (if, indeed, any acceptance were necessary), is evidenced by the grantee demanding

the patent of the Secretary of the Interior and taking possession of the land under the grant, improving the same and making valuable improvements thereon.

The grant being beneficial to the grantee, an acceptance is presumed.

(j) By making request for the patent and taking possession of the land under the grant, the grantee waived his right to any other allotment of land or money settlement in lieu of an allotment.

Indeed, we believe that even without any acceptance of the grant, Rowell would not have been entitled to demand any other allotment of land or money settlement in lieu of an allotment.

(k) The act of Congress took effect and became the law upon its approval by the President of the United States. No further action of Congress was necessary to vest the title to the land.

(l) Any patent issued by the Secretary of the Interior has no other authority for its making, than the law authorizing it.

(m) A fee simple patent under the Kiowa, Comanche and Apache agreement alone, issued by the Secretary of the Interior would be absolutely void, for the reason that there would be no legislative authority behind it, and a patent issued without authority of law is void.

(n) The act itself is a higher evidence of title than the patent, because it is the expression of the only authority, having the power to authorize or make the grant.

(o) When the act was passed the land was segregated from the public domain and the legal title passed to Rowell together with his vested right to the patent as evidence of the title granted by the act and which could only be divested if at all from the grantee by a proper action in a court of equity.

(p) The Secretary of the Interior, under the act, is vested with no judicial power and could not, by failing to issue the patent, abrogate the grant lawfully made by the Congress on behalf of the United States to the grantee.

(q) The Congress of the United States is a legislative body. It is vested with no judicial power to abrogate grants or destroy vested rights.

(r) The repealing act is unconstitutional because it at-

tempts by legislative action to deprive the grantee of his property without due process of law, and without just compensation.

(s) The act of Congress making the grant becomes effective upon its becoming a law; it is not dependent upon any future contingency, therefore, it is a grant *in praesenti.*

(t) The act contains no limitations, express or implied, that title should not pass until patent issued.

(u) As to whether or not the act is a grant *in praesenti,* the intent must be gathered from the language of the act construed in the light of the surrounding circumstances. The intent to pass the title appearing and no words of limitation used, it will be held to be a grant *in praesenti* even though the words grant or convey are not used in the act.

(v) The United States could not have maintained ejectment after the passage of the act of June 17, 1910, against the grantee because of the failure of the Secretary of the Interior to issue the patent; therefore the title passed to, and became vested in the defendant James F. Rowell and the Congress of the United States could not repeal the grant and deprive the grantee of his vested rights.

(w) This case, therefore, stands on exactly the same footing, and the rights of the parties are to be determined irrespective of the attempted repeal of the granting act.

II.

The Act of June 17, 1910, is a Grant in Praesenti.

The foregoing statements we believe, are conclusive of the rights of the defendants under the act of June 17, 1910.

Numerous cases have been decided by this court in which the questions involved here have been discussed, and, as we view the case, the law is well settled.

The case of *Rutherford* v. *Green's Heirs, 2 Wheat. 196,* decided in 1817, we think is decisive of the question here. This case has been cited and followed in a great many cases. Mr. Chief Justice Marshall states the case and discusses the questions involved, as follows:

> "As this case depends entirely on the validity of Greene's title, the court will notice only so much of the record as respects that title.
>
> "In the year 1777 the state of North Carolina opened

a land office, for the purpose of selling all the vacant lands east of a line described in the act.

"In the year 1780 an act passed, reserving a certain tract of country for the officers and soldiers of the line of that state.

"This act is lost.

"In the year 1782 an act passed, 'for the relief of the officers and soldiers in the continental line, and for other purposes therein mentioned.' This act gives certain specified quantities of land to the officers and soldiers; then the 7th section commences thus: 'And, whereas, in May, 1780, an act passed at Newburn, reserving a certain tract of country to be appropriated to the aforesaid purposes, and it being represented to this present assembly, that sundry families had, before the passing the said act, settled on the said tract of country, be it enacted,' etc. The section then proceeds to grant 640 acres of land to each family which had so settled. The 8th section apoints commissioners to lay off, in one or more tracts, the land allotted to the officers and soldiers. *The 10th section enacts, 'that 25,000 acres of land shall be alloted for and given to, Major-General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense this state entertains of the extraordinary services of that brave and gallant officer.'*

"This is the foundation of the title of the appellees.

"On the part of the appelant it is contended, that these words give nothing. They are in the future, not in the present tense; and indicate an intention to give in future, but create no present obligation on the state, nor present interest in General Greene.

"The court thinks differently The words are words of absolute donation, not indeed of any specific land, but of 25,000 acres in the territory set apart for the officers and soldiers.

" 'Be it enacted, that 25,000 acres of land shall be allotted for and given to Major-General Nathaniel Greene.' Persons had been appointed in a previous section to make particular allotments for individuals, out of this large territory reserved, and the words of this

section contain a positive mandate to them to set apart 25,000 acres for General Greene. As the act was to be performed in future, the words directing it are necessarily in the future tense. 'Twenty-five thousand acres of land shall be allotted for, and given to, Major-General Nathaniel Greene.' Given when? The answer is unavoidable—when they shall be allotted. Given how? Not by any future act;—for it is not the practice of legislation to enact, that a law shall be passed by some future legislature:—but given by force of this act.

"It has been said, that, to make this an operative gift, the words 'are hereby' should have been inserted before the word 'given'; so as to read, 'shall be allotted for, and are hereby given to,' etc. Were it even true that these words would make the gift more explicit, which is not admitted, it surely cannot be necessary now to say, that the validity of a legislative act depends, in no degree, on its containing the technical terms usual in a conveyance. Nothing can be more apparent than the intention of the legislature to order their commissioners to make the allotment, and to give the land when allotted to General Greene."

At page 199 objection was urged by counsel that the act of the legislature of North Carolina did not constitute a grant, because the Constitution of North Carolina required all grants to be authenticated with the seal. The Chief Justice in discussing this phase of the case and the provision of the North Carolina Constitution, has this to say:

"This provision of the constitution is so obviously intended for the completion and authentication of an instrument, attesting a title previously created by law, which instrument is so obviously the mere evidence of prior legal appropriation, and not the act of original appropriation itself, that the court would certainly have thought it unnecessary to advert to it, had not the argument been urged repeatedly, and with much earnestness by counsel of the highest respectability."

In the opinion at page 205 the learned Justice sums up the case as follows:

"It is clearly and unanimously the opinion of this court that the act of 1782 vested a title in General Greene to 25,000 acres of land, to be laid off within the bounds

allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned in March, 1783, gave precision to that title, and attached it to the land surveyed. That his rights are not imparied by the acts of 1783, and the entry of the appellant, all of which are subsequent to his survey; and that it is completed by the grant which issued in pursuance of the act of 1784, and which relates to the inception of his title."

The act of the legislature of North Carolina involved in *Rutherford* v. *Greene's Heirs*, the words "grant and convey" were not used. The land was not described.

The grant could not attach to any specific land until the lands were surveyed and allotted by the commissioners.

The act in the case at bar describes the land and directs the Secretary of the Interior to make a patent—not some time in the future, but now.

The meaning of an act directing the Secretary of the Interior to make a patent is merely that he shall set in motion the proper machinery. This he did on the 22nd day of June, 1910, and so far as the Secretary of the Interior's compliance with the act of Congress, he had done all that he could do. He directed the Commissioner of the General Land Office in writing to issue the patent or cause it to be done.

It is true that the act does not use the terms "grant and convey," but it was said by Chief Justice Marshall in *Rutherford* v. *Greene's Heirs*:

> "It surely cannot be necessary now to say, that the validity of a legislative act depends, in no degree, on its containing the technical terms usual in a conveyance. Nothing can be more apparent than the intention of the legislature in their order to the commissioners to make the allotment, and to give the land when allotted to General Greene."

The case of *Simmons* v. *Wagner, 101 U. S.* was an action of ejectment brought by Simmons against Wagner the defendant for the possession of land which he claimed under a patent from the United States.

The defendant claimed through a purchase made under an old credit system, April 17, 1816, by one John Lewis, and a paper bearing date July 8, 1829, which purported to be a certificate of full payment of the purchase money in favor of William Russell.

As appears from the opinion, the trial court found the issue joined for the defendant on the ground that the premises in controversy, on the issue of the final certificate to William Russell, ceased to be a part of the public domain, and were not thereafter subject to entry by individuals or sale by the United States, and to which finding the plaintiff then and there excepted.

In the opinion at page 261 Mr. Chief Justice Waite, speaking for the court, says:

> "Where the right to a patent has once become vested in a purchase of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty."

In the case at bar the defendants rely upon act of congress. It is certain that the right to the patent became vested in the defendant James F. Rowell upon the approval of the act and its becoming a law, in pursuance of which he requested the patent to be issued to him. The right to the patent was complete and so far as the government is concerned, is equivalent to a patent actually issued.

The case of *Barney* v. *Dolph, 97 U. S. 652* was an action of ejectment. The rights of the respective parties, the heirs of the settler and the vendee of the settler was involved. No patent had been issued to the settler, but they had complied with the requirements of law to entitle them to a patent. In the opinion at page 656, the court say:

> "When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued. We so decided in *Stark* v. *Starrs, 6 Wall. 402.* The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty. An authorized sale by a settler, therefore, after his right to a patent had been fully secured, was, as to the government, a transfer of the ownership of the land."

The case of *Stark* v. *Starrs, 6 Wall. 402,* is another case arising under the Oregon Donation Act. The second, third, fourth and fifth syllabi state the questions involved and decided in the case, as follows:

"2. Under the act of Congress, of September 27, 1850, 'to create the office of survey-general of the public lands of Oregon,' (the act commonly known as 'The Oregon Donation Act,' and stated fully in the case), the right of the claimant to a patent became perfected when the certificate of the surveyor-general and accompanying proofs, were received by the commissioner of the general land office, and he found no valid objection thereto.

"3. The act of August 14, 1848, organizing the Territory of Oregon, which declared that all laws of the United States should be in force in the Territory, 'so far as the same, or any provision thereof, may be applicable,' did not extend over the country any portion either of the general Pre-emption Act of September, 1841, or of the act of May 23, 1844, commonly known as the 'Townsite Act.'

"4. The right to a patent once vested is equivalent, as respects the government dealing with the public lands, to a patent issued. When issued, the patent, so far as may be necessary to cut off intervening claimants, relates back to the inception of the right of the patentee.

"5. The patent issued to the corporate authorities of the city of Portland, in Oregon, in December, 1860, upan an entry made under the Townsite Act of May 23, 1844, passed no title to the land covered by the donation claim of a person whose right to a patent was perfected previously to such entry, and whose claim was surveyed previously to the act of July 17, 1854; by which the Townsite Act was extended, though with qualifications, to Oregon Territory."

In the opinion at page 417 et seq., Mr. Justice Field speaking for the court, says:

"We are clear that the Townsite Act of 1844 was not extended to Oregon until the 17th of July, 1854; and even then that it only operated to exclude lands occupied as townsites, or settled upon for purposes of business or trade, from a donation claim, which had not been previously surveyed. Before the passage of this act the claim of the defendant, Stark, had been surveyed, and the required proof of his settlement and continued occupation and residence made, and such steps had been taken as to perfect his right to a patent. The lands embraced by

his claim had then ceased to be the subject of purchase from the United States by any person, natural or artificial. The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued."

The case of *Ballinger, Secretary of the Interior,* v. *Frost, 216 U. S. 240,* again decides the question that when the right to a tract of government land becomes fixed that the title passes and that the issuance of a patent is a mere ministerial act. The first, second, third and fourth syllabi state the law as follows, to-wit:

"1. The power of supervision and correction vested in the Secretary of the Interior over Indian allotments is not unlimited and arbitrary; it cannot be exercised to deprive any person of land the title to which has lawfully vested.

"2. However reluctant the courts may be to interfere with the executive department, they must prevent attempted deprivation of lawfully acquired property and it is their duty to see that rights which have become vested pursuant to legislation of Congress are not disturbed by any action of an executive officer.

"3. The head of the department of the government is bound by the provisions of congressional legislation which he cannot violate, however laudable may be his motives.

"4. After all the requirements of the act of Congress providing for distribution of Indian lands have been complied with, and the statutory period has elapsed without contest, the title of the allottee becomes fixed and absolute and only the ministerial duty of execution and delivery of the patent remains for the Secretary of the Interior."

In the opinion by Mr. Justice Brewer, it is said:

"Whenever, in pursuance of the legislation of Congress, rights have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a departmnet. However, laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation."

After reciting the legislation of Congress relating to al

lotment of lands, among the Choctaw and Chicaksaw Indians, it is further said:

"Thereafter the relator selected the land in controversy, a tract of forty acres, on which were her improvements. Notice was given as required, and the time in which contest could be made—nine months—elapsed. Thereupon, as provided by the statute, the title of the allottee to the land selected became fixed and absolute, and the chief authorities of the Choctaw and Chickasaw Nations executed to her a patent, as required, of the land selected. The fact that there may have been persons on the land is immaterial. They were given nine months to contest the right of the applicant. They failed to make contest, and her rights became fixed. Thereafter the Secretary of the Interior had nothing but the ministerial duty of seeing that a patent was duly executed and delivered."

At page 250 the cases of *Barney* v. *Dolph and Simmons* v. *Wagner supra,* are cited with approval to the effect that the execution and delivery of the patent after the right to it is complete, are the mere ministreial acts of the office charged with that duty.

The case of *Grignon and others* v. *Astor and others, 2 How 319,* was ejectment. Both parties derived title from Pierre Grignon, deceased, who was one-eighth Indian and seven-eighths French. He died in March, 1823, leaving Robert, born in 1803, and Peter, born in 1805 or 1806, and his only children by an Indian woman to whom it was alleged he had been married. They made a conveyance of one-third of the lands to Morgan L. Martin, by deed, 15th of November, 1834, who, together with the two sons of Pierre, were the lessors of the plaintiff below.

A patent was issued by the United States on the 21st day of December, 1829, to Pierre Grignon and his heirs, reciting, that by the third section of the Act of Congress, approved on the 21st day of February, 1823, Pierre Grignon was confirmed in his claim to the tract of land containing 230 acres, bounded, etc., and granting said land accordingly.

This was the case made out for the plaintiffs in the court below.

The defendants' title was this.

Pierre Grignon died intestate in March, 1823. Letters

of administration upon his estate were granted by the judge of probate of Brown county, on the 21st of June, 1824, to Paul Grignon, who applied under the laws of Michigan, to the County Court of Brown county for power to sell the real estate of the deceased. The authority was granted and the sale made, under which the title passed through Augustine Grignon, to Astor, Crooks ,and Stuart the defendants in the court below. The sale in probate was made in 1824.

The patent was issued to Pierre Grignon and his heirs in December, 1829.

At page 333 the statement of the case shows plaintiff's contention in part, as follows:

> "6. The plaintiff contended at the trial, and contends here, that the lands claimed in the action could not legally be sold by the administrator under any order or judgment of any court, as the real estate of Pierre Grignon, for the payment of his debts. And that the patent passes a perfect title to plaintiff's lessors.
>
> "The law of Michigan above referred to, and in part set forth, authorizes the sale of the 'houses, lands or tenements, of the deceased.' The estate in question was not such. The title of Pierre Grignon at his death if any, was equitable only, resting on the pleasure or justice of government, and could not be taken in execution or sold for his debts. The patent of 21st December, 1829, vested the title directly in the heirs. But the District Court decided otherwise."

At page 335 the contention of the defendants is stated as follows:

> "8. The interest of Pierre Grignon in these lands, at the time of his death, was an interest existing at the date of the Act of Congress of February 21, 1823, and so liable to be sold by his administrator, as goods, chattels, lands, or tenements. The purchaser, by the administrator's sale, acquired as good a title as the intestate could in his lifetime convey for a valuable consideration.
>
> "The patent issued after his death enured to the benefit of his assigns, the defendants deriving their title under him."

Mr. Justice Baldwin delivered the opinion of the court

and in response to the question here under discussion, at page 344, stated the law as follows:

> "It has been contended by the plaintiff's counsel that the sale in the present case is not valid, because Peter Grignon had not such an estate in the premises as could be sold under the order of the County Court, it being only an equitable one before the patent issued in 1829; but the title became a legal one by its confirmation by the Act of Congress of February, 1823, which was equivalent to a patent. It was a higher evidence of title, as it was the direct grant of the fee which had been in the United States by the the government itself, whereas, the patent was only the act of its ministerial officers."

In the case at bar we respectfully urge that the Act of Congress of June 17, 1910, was equivalent to a patent and is a higher evidence of title than the patent, it being a direct grant of the fee by the United States itself, whereas, the patent provided for was only the act of its ministerial officers.

In the case of *Strother* v. *Lucas, 12 Peters 410,* in the syllabus at page 411 et. seq. it is stated:

> "A grant may be made by a law, as well as a patent pursuant to a law; and a confirmation by a law, is as fully to all intents and purposes a grant, as if it contained in terms a grant *de novo.*"

The case was one arising under old French and Spanish land grants in Louisiana prior to the purchase.

In the opinion at page 454, Mr. Justice Baldwin has this to say:

> "We must, then, take the defendant, as one holding the premises in controversy, by a grant from the United States, and their grantee, entitled to all the protection of the laws appropriate to the case. The unanswerable reasoning of this Court in *Green* v. *Liter,* the principles of law on which it is founded, with the admitted authority with which it has been received, save the necessity of any reference to any other source for its support. 8 Cr. 244-49. That a grant may be made by a law as well a patent pursuant to a law, is undoubted, 6 Cr. 128; and a confirmation by a law, is as fully to

all intents and purposses a grant, as if it contained in terms a grant *de novo.*"

In the case of *Langdeau* v. *Hanes, 21 Wall. 521,* the fifth syllabus states the law as follows:

"5. A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant of quit-claim from the government. If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim to quantity, and not to a specific tract capable of identification, a segregation by survey will be required and the confirmation will then immediately attach the title to the land segregated."

In the opinion at page 529 et. seq. Mr. Justice Fields, speaking for this court discusses the question involved as follows:

"By the act of March 3rd 1807, this decision, and all other decisions in favor of persons claiming lands in the District of Vincennes, contained in the transcript transmitted to the Secretary of the Treasury, were confirmed. This confirmation was the fufilment of the condition stiplated in the deed of cession so far the claimants were concerned. It was an authoritative recognition by record of the ancient possession and title of their ancestor, and gave to them such assurance of the validity of that possession and title as would be always respected by the courts of the country. *The subsequent clause of the act providing for the issue of a patent to the claimants, when their claim was located and surveyed, took nothing from the force of the confirmation.*

"In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has an interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing

rights because it also embodies words of release or transfer from the government.

"In the present case the patent would have been of great value to the claimants as record evidence of the ancient possession and title of their ancestor and of the recognition and confirmation by the United States, and would have obviated in any controversies at law respecting the land, the neccessity of other proof, and would thus have been to them an instrument of quiet and security. But it would have added nothing to the force of the confirmation. The survey required for the patent was only to secure certainty of description in the instrument, and to inform the government of the quantity reserved to private parties from the domain ceded by Virginia.

"The whole error of the plaintiff arises from his theory that the fee to land in controversy passed to the United States by the cession from Virginia, and that a patent was essential to its transfer to the claimants, whereas, with respect to the lands, covered by the possessions of the inhabitants and settlers mentioned in the deed of cession, the fee never passed to the United States; and if it had passed, and a mere equitable title had remained in the claimants after the cession, the confirmation by the act of 1807 would have operated as a release to them of the interest of the United States. A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quit-claim from the government. "A confirmation," says Sheppard in his Touchstone of Common Assurance, "is the conveyance of an estate, or right, that one hath in or unto lands or tenements, to another that hath the posession thereof, or some estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased and enlarged." If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation

will then immediately attach the title to the land segregated.

"We do not understand that the ancient grant to Tongas was only of quantity, but understand that it was of a specific tract of two hundred and four acres, and that the decision of the commissioners in favor of the claimants had reference to a defined tract. If such were the fact the title of the heirs was perfected, assuming that previously they had only an equitable interest upon the passage of the confirmatory act of 1807; if, however, the grant was of a certain quantity of land then undefined and incapable of identification, the title became perfect when the quantity was segregated by the survey made in 1820."

The case of *Northern Pacific Railway Company* v. *Majors*, from the Supreme Court of Montana, *2 Pac. 322*, is a case construing by the State Court, the Northern Pacific Land grant. In the syllabus it is stated:

"A grant of land by the government is a higher evidence of title than a patent; it is tantamount to a conveyance with livery of seizin, and will support ejectment.

"Where an Act of Congress is in itself a grant, the purpose of a patent is merely that of a confirmation of a title already bestowed."

It is true that the Act of Congress granting the lands to the Northern Pacific Railway recited, "that there be and is hereby granted to said road certain lands," but it was claimed that the words of the present grant were restricted by the provisions of other portions of the act which prescribed certain conditions and especially by those which it was claimed determined when the grants shall take effect; namely, when twenty-five consecutive miles of the road have been completed and after the report of commissioners, etc., patent shall be issued to the company conveying additional sections etc., and it was contended that until this time, namely, when the patent shall have been issued in accordance with the act, the right of the respondent in the lands by virtue thereof is simply the "grant of an uncorporeal right in said lands accompanied by certain conditions upon the performance of which conditions the act provides how and when the title shall vest in the company, to-wit, the land shall be

conveyed by patent when its twenty-five miles of the road shall be completed, and not before.

"No patent had been issued to the company and the action was ejectment for possession of the land covered by the grant claimed by adverse possession."

A general discussion of the question involved here is found in the opinion at page 325, as follows:

"The act will be presumed to have been passed by congress with knowledge of its previous enactments in relation to grants of lands, and the repeated determinations of the Supreme Court of the United States as to their construction. That court has repeatedly held, in construing grants of land made by congress, that "a grant" of lands, "may be made by law as well as by a patent issued pursuant to law," "and such grant invests an indefeasible and irrevocable title." *Fletcher* v. *Peck,* 6 Cranch, 87; *Strother* v. *Lucas,* 12 Pet. 454; 9 Cranch, 43; *Wilkinson* v. *Leland,* 2 Pet. 627; *Wilcox* v. *Jackson,* 13 Pet. 498; 3 Wasb. Real Prop. (4th Ed.) 193, 194. "It" (the confirmation of a title by Act of Congress) "was a higher evidence of title," (than a patent,) "as it was the direct grant of the fee which had been in the United States by the government itself, whereas, the patent was only the act of its ministerial officers." *Grignon's Lessee* v. *Astor,* 2 How 319. "The plaintiff's title" (a confirmation by congress,) "is prima facie a good legal title, and will support ejectment on the act of 1836, standing alone, if the land can be identified as confirmed without resort to the patent." *Chouteau* v. *Eckhart,* 2 How. 344. *In Green* v. *Liter,* 8 Cranch, 229, STORY, J. says:

"We are entirely satisfied that a conveyance of wild or vacant lands gives a constructive *seizen* thereof in deed to the grantee, and attaches to him all the legal remedies incident to the estate. A *fortiori,* this principle applies to a patent. Since at the common law it imports livery in law." For a still stronger reason would this principle apply in the case of an act granting such lands, for, as we have just seen, the Supreme Court of the United States has held that such an act is higher evidence of title than a patent."

Again in the opinion at page 337, *et seq.*, the court say:

"Our conclusion, therefore, both from reason and authority, is that the title of the respondent took effect at the date of the approval of the Act of Congress; that the location of the route and the survey of the lands, gave precision to that title and caused it to attach to the particular sections, as of the date of the approval of the act, as fully as if such particular sections had been designated in the act; that the character of the title is that of a grant upon condition subsequent, and that the office of the patent is to confirm the title as certain designated portions of the road are completed and reported upon by the commissioners and render it absolute and unconditional. *Ferris* v. *Coover, 10 Cal. 589.* The grant being by Act of Congress is the highest evidence of title importing, in the case presented, possession and livery of *seizin*, and is sufficient in connection with the other allegations of the complaint to sustain ejectment."

In the case of *St. Paul and Pacific Railroad company* v. *Northern Pacific R. R. Co., 139 U .S. 1,* the construction of the same Act of Congress came before the Supreme Court of the United States and the opinion was rendered by Mr. Justice Field.

In discussing the contention that no title passed under the act until the patent issued and speaking of the grant the learned Justice has this to say:

"It is contended that they are qualified, and restricted by the provision of the fourth section, that whenever twenty-five miles of the road are completed in a good, substantial and workmanlike manner, and the commissioners appointed to examine the same have made a report to that effect to the President, patents shall be issued "confirming to said company the right and title to said lands, situated opposite to, and *coterminous* with, said completed section of said road." This provision, it is urged, is inconsistent with the theory that a title to the lands had previously vested in the company. We do not think so. There are many reasons why patents should be issued upon the completion of each section of the road. They would not only identify

the lands as *coterminous* with the completed section, but they would be evidence that, as to that portion of road, the conditions of the grant had been complied with, and that it was thus freed from any liability to forfeiture for a disregard of them. They would also obviate the necessity of any further evidence of the grantee's title. As deeds of further assurance they would thus be of great value in giving quiet and peace to the grantee's possession. *There are many instances in the legislation of Congress where patents are authorized to be issued to parties in further assurance of their title, notwithstanding a previous legislative grant to them or a legislative confirmation of a previously existing claim. The previous grant or confirmation is in no respect impaired thereby, or its construction affected See on this point Langdeau* v. *Hanes,* 21 Wall. 521; *Wright* v. *Roseberry* 121 U. S. 488, 497."

The case of *Wright* v. *Roseberry,* 121 U. S. 488 is a case arising under the Swamp Land Act approved September 28, 1850. The first, second, third, fourth and fifth syllabi state the question involved and the law thereon as follows:

1. "The grant of swamp and overflowed lands to the several states by act of September 28, 1850, is one in *praesenti,* passing title to the lands of the character therein described, from its date, and requiring only identification thereof to render such title perfect."

2. "Such identification by the Secretary of the Interior is conclusive against collateral attack as being the judgment of the special tribunal on which such duty was imposed.

3. "On neglect or failure of that officer to make such designation, it is competent for the grantees of the state to identify the lands in any other appropriate mode to prevent their rights from being defeated.

4. "After segregation of the lands by the state and adoption of the segregation surveys by the proper federal officers, the right of the state's grantees to maintain an action for recovery thereof cannot be defeated because such lands have not been certified or patented to the state.

5. "The issue of patents for these lands to de-

fendants or their grantors, under the pre-emption laws, upon claims initiated subsequent to the swamp grant to the state is not conclusive at law as against parties claiming under such grant, and in an action for their possession evidence is admissible to determine whether or not the lands were in fact swamp and overflowed at the date of the swamp land grant; if proved to have been such, the rights of subsequent claimants under other laws are subordinate thereto."

The second section of the Swamp Land Act as set forth at page 495 is as follows:

Sec. 2. "And be it further enacted, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described, as aforesaid, and transmit the same to the governor of the State of Arkansas, and at the request of said governor, cause a patent to be issued to the state therefor; and on that patent the fee simple to the lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: Provided, however, that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary to the purpose of reclaiming said lands by means of the levees and drains aforesaid."

The court will note that in this section it is provided that for the issuance of patent to the state and on that patent the fee simple to the land shall vest.

In a discussion of the questions involved and as to when title passed to the state under the Swamp Land Act, Mr. Justice Field, at page 496 *et. seq.* has this to say:

"Soon after the passage of this act, the question arose as to the time the grant took effect; whether at the date of the act, or on the issue of the patent to the state upon the request of the governor, after the list and plats of the land were made out by the Secretary of the Interior and transmitted to him. The question was one of great importance to all the states in which there were swamp and overflowed lands. These lands amounted many millions of acres. In California alone there were according to the Land Department, nearly two millions of acres * * *.

cates a grant *in praesenti* to each state of lands within its limits of the character described. Its words 'shall be and hereby granted,' import an immediate transfer of interest, not a promise of a transfer in the future. It was only when the other sections of the act were read that a doubt was raised as to the immediate operation of the act. On the one hand, it was contended, that these sections postponed the vesting of title in the state until the lands granted were identified, and a patent of the United States for them was issued.

"On the other hand, it was insisted that effect must be given to the clear words of the granting clause of the first section, which *ex vi termini*, import the passing of a present interest, and that, in consistency with them, the other provisions of the act should be regarded as simply providing the mode of identifying the lands, and furnishing documentary evidence of their identification, and not as a limitation upon vesting the right of them in the state, as this would make the investiture dependent upon the request of the governor, and not upon the Act of Congress. It was also urged that identification of the lands could be made in a majority of instances from simple examination of them, and that no policy of the government could be advanced by postponing the passing of the title until the identification by the Secretary of the Interior; and that the clause providing that upon the issue of the patent the fee should pass, was merely declaratory of the nature of the title, the patent operating merely by way of further assurance * * * .

"There are numerous cases in the history of the country where Congress, after confirming to parties title to lands, has directed that patents of the United States should be issued to them; yet, it has been held that the patent in such cases operated merely as record evidence of the title and added nothing to the title itself."

Again, the court after reviewing the case of *Langdeau* v. *Hanes*, 21 Wall. 521, proceeds to quote from the opinion in that case with approval, that portion of the case which we have quoted in reviewing the case.

The Supreme Court also cites the cases from Arkansas.

Fletcher v. *Pool,* 20 Ark., 100; *Branch* v. *Mitchell,* 24 Ark., 104; *Ringo's Executors* v. *Roton's Heirs,* 29 Ark. 56.

In *Fletcher* v. *Pool, 20 Ark. 102,* in discussing the Swamp Land Act the court said:

> "That the act was a present grant, vesting in the State, *proprio vigore,* from the day of its date, title to all the land of the particular description therein designated, wanting nothing but the definition of boundaries to make it perfect, no doubt can be entertained. *Rutherford* v. *Green's Heirs,* 2 Wheat, 197; *Opinions of Attorney-General Black* of the 7th June, 1857, and 10th November, 1868, (precisely in point), and authorities therein cited, etc.
>
> "The object of the second section, was not to postpone the vestiture of title in the State until a patent should issue, but was to provide for the ascertainment of boundaries, and to prevent a premature interference with the lands by the State Legislature before they were so designated as to avoid mistake and confusion. Where land is granted by legislative enactment, and the grantee is authorized to demand a patent for the lands, his title is as much vested as if it had the patent, which is but evidence of his title."

The case of *Branch* v. *Mitchell, 24 Ar., 431,* cited by the Supreme Court of the United States in *Wright* v. *Roseberry, supra,* in the opinion, at page 444, the Supreme Court of Arkansas says:

> "However that may be, we continue satisfied with the decisions heretofore made; and again hold that all the lands in the State which were really and in fact swamp and overflowed, and thereby unfit for cultivation, passed to and vested in the State, on the 28th of September, 1850. The case is the same as if the grant had been of all the prairie land, or all the woodland or all the alluvial land, in the State; the difficutly of assertment of its character not affecting the question. The words of grant, the operative words are direct and positive; shall be, and the same are hereby granted to the state; and the provision of the second section, that the Secretary of the Interior should make out and transmit to the governor a list and plats of the land described, and at the request of the governor, cause a patent

to issue to the State; and that "on that patent, the fee simple to said lands shall vest in the said State," can no more be held to limit the effect of the present grant in the first section, than if, in a deed, after immediate and express conveyance of lands by some general description, it should be provided, when the numbers should be ascertained, another deed should be made, "on which the fee simple should vest." This would make the title of the State to any of the land, depend on the request of the Governor for a patent. The words of the second section must be held to be simply a definition of the nature of the title which the State took under the grant, and not a postponement of the period at which the title should vest."

The case of *Kansas* v. *Stringfellow, 2 Kan. 259* was an action of ejectment brought by the State against the defendant to recover possession of a part of the southeast quarter of section 36, township 5, range 20, and known as lot 1 in block 63, in the city of Atchison.

Section 34 of the Organic Act of the Territory of Kansas is as follows:

Sec. 34. "When the lands in said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into the market, sections number sixteen and thirty-six in each township shall be and the same is hereby reserved for the purpose of being applied to the use of schools in said territory, and in the States and Territories to be hereafter erected out of the same."

Section 34 of the Organic Act of the Territory copied in the opinion at page 313 provides as follows:

"As has already been observed the objects of this act were, so far as the Territory of Kansas is concerned the fixing of the boundaries thereof and establishing a government therein. It contains no provision for the sale or other disposition of the public lands therein. Another act upon that subject was passed at the same session. Sec. 5 of this latter act is substantially a copy of Sec. 34 above quoted. It must be apparent that something more than a mere reservation from sale was contemplated by section 34; and upon its construction the rights of the parties must depend.

"It is well settled that no particular words are necessary to constitute a grant, especially for public uses; and we are fully satisfied from the authorities that section 34 amounted to a grant of the lands therein described, to the people of the territory, for the use of schools—a dedication—an appropriation thereof for that object. (*Chotard* v. *Pope*, 12 Wheat. 590; *Rutherford* v. *Green's Heirs*, 2 Wheat. 198; *City of Cincinnati* v. *White's Lessee*, 9 Peters, 240; *New Orleans* v. *United States*, 10 Peters, 713; *Trustees of Vincennes University* v. *The City of Indiana*, 14 How. 268.)"

Under the act of the legislature of the territory 1855 authorizing the sale of school lands the Governor of the Territory conveyed the quarter section described to the Atchison Town Company which contained the lot in question and by the Town company conveyed to defendant and this conveyance was the source of the title upon which the defendant based his defense to the action of the state.

It will be noted that the only grant to the territory is: "Section numbers 16 and 36 in each township shall be and they are hereby reserved for the purpose of being applied to the use of the schools in said territory and in the states and territories to be hereafter erected out of the same." The territory based its right to sell the lands upon this grant alone.

The case of *Board of Trustees* v. *Cuppet, 40 N. E. (Ohio) page 792*, was an action to recover real property and rents and profits. By Act of Congress approved February 18, 1871 there was granted to the State of Ohio certain lands. The act reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America assembled, that the lands remaining unsurveyed and unsold in the Virginia Military District, in the State of Ohio, be and the same are hereby ceded to the State of Ohio, upon the conditions following, to-wit: Any person, who, at the time of the passage of this act is a bona fide settler on any portion of land may hold not exceeding one hundred and sixty acres so occupied, by his pre-emting the same in such manner as the legislature of the State of Ohio may direct."

The defendants hold under a patent issued by the United

States claimed to have been issued under bounty warrants arising out of the military service. The various Acts of Congress granting lands in thhe Virginia Military District to officers and soldiers of the Virginia troops are considered and discussed in the opinion.

The grant of February 18, 1871 was accepted by act of the legislature passed March 26, 1872, and granted the lands to the Ohio Agricultural and Mechanical College, the name of which has since been changed to that of Ohio State University and made provision for the pre-emption of portions of the lands by bona fide settlers in accordance with the conditions of the grant.

In the meantime on the 27th day of April, 1871 a patent for the lands in dispute was issued to the representatives of Lieut. Routt, upo nthe survey which was made as before stated prior to January 1, 1852, but not returned until after that date. The defendants by a chain of intermediate conveyances connect themselves with that patent and claim title from no other source.

The only title which the plaintiff, the Board of Trustees of the State University claim to the land is the *congressional grant aforesaid* and the *act* of the *legislature* accepting the grant and conveying the title to what is now the State University.

The defendants claim title as before stated under the patent and their contention is that the patent establishes the regularity of all the steps preliminary and necessary to its issuing, and is conclusive as to the title, until set aside by direct proceedings. In the opinion at page 794 the court says:

> "The soundness of that position, it is manifest must depend upon whether, when the patent was obtained, the title to the lands covered by it was still in the government of the United States. If before that time it had parted with all its title to the lands, of course none was conveyed by the patent; for a patent cannot any more than the deed of an individual, create title to anything not owned by the grantor. The question is thus raised, when did the title to the lands ceded by the act of Febuary 18, 1871, vest in the state? Was it when the act took effect, or not until the acceptance of the

grant by the state If at the former date, the patent could not divest the state's title, for once vested, it became irrevocable; but if the title did not vest until the passage by the legislature of the act accepting the grant, the state acquired no title to the lands in question, for the reason that, having already been conveyed by the patent, they were taken out of the terms and operation of the grant to the state. It is well settled that, in construing a congressional grant, "It is to be borne in mind the act by which it is made is a law as well as a conveyance, and such effect must be given to it as will carry out the intent of congress."

Again, at page 795 the court says:

"Under the well settled rule of construction of congressional grants, that made to this state by the act of February 18, 1871, is a grant *in praesenti*, its language being "that the lands remaining unsurveyed and unsold in the Virginia Military District, in the State of Ohio, be and the same are hereby ceded to the State of Ohio." Its formal acceptance by act of the leglislature, or otherwise, is not made a condition to the vesting of the title, and there are no reservations in the act except the right of pre-emption of limited quantities of land by bona fide settlers. The duty imposed upon the legislature of prescribing the manner of making such preemptions is not a condition precedent to the investing of the state with the title to any of the lands embraced in the grant, but is rather a condition subsequent, to the performance of which contemplates the title as being in the state subject only to the rights of bona fide settlers to make pre-emptions of lands occupied by them not exceeding the quanity allowed by the act. It seems clear therefore, that on February 18, 1871, when the act of cession to the state took effect, the defendants had no beneficial estate in the lands in controversy, either legal or equitable; and the complete title to them, on that day, vested in the state. It is also clear that its title cannot be defeated or impaired by the subsequently obtained patent under which the defendants claim. The congressional grant to the state was itself a patent, or the equivalent of a patent; and the plaintiff is in the

position of a holder of the elder of two conflicting patents, which must prevail over the junior."

Again, at page 796 the court says:

"Finally, it is claimed the defendants' title to the lands in question was confirmed by the Acts of Congress of May 27, 1880, and August 7, 1882. By the former of these acts it is declared that the true intent and meaning of the act of Feb. 18, 1871, was to cede to the state of Ohio only such lands as were unappropriated and not included in any survey or entry; and the latter act provides that persons who have been in possession of any of the lands for 20 years under claim or color of title based on such entry shall be deemed the legal owners of the land included in the entry. But here, again, whether this claim of the defendants can be maintained must depend upon whether the title to the lands vested in the state by the act of cession. If, notwithstanding that act, the title remained in the general government, there could be no objection to its making such disposition of them as it should choose to make, and the defendants might well claim their title was assured by the legislation referred to; but if, as we have seen is the case, the indefeasable title was vested in the state, the lands ceased to be within the control of congress, and such subsequent legislation could not divest or otherwise affect the state's title to them, though ceded as a donation, any more than the acts or declarations of any other grantor, after he has parted with his title by valid conveyance could affect the title of his grantee. If it were otherwise, the cession would amount to a mere revocable license; for it is obvious that, if the lands ceded were thereafter subject to congressional control in any respect, they must be in all, and could be wholly withdrawn from the operation of the grant."

And the Court holds that the act being a grant *in presenti*, Congress could not by subsequent legislation, destroy the vested rights or make a valid grant of the land to others.

Shaw v. *Kellogg*, 170 U. S. 312. This was a case of a mineral land grant. It was an action of ejectment on certain land claimed as a mining claim as against the grant. The premises are within the limits of so-called Baca Grant Number 4. The

plaintiff is the owner of that grant and the question presented is as to the validity and extent of his title.

The grant was made by Mexico prior to the treaty of Guadaloupe, Feb. 2, 1848. By an act of February 22, 1854, the office of surveyor general of the territory of New Mexico was created and by Section 8 it was made his duty to examine into all claims for lands within the territory and make full report thereto to Congress. In pursuance to this authority the surveyor general examined and reported upon all the various claims and there was a dispute as to certain claims in the vicinity of Las Vegas. In order to settle this dispute, Congress enacted "that it shall be lawful for the heirs of Luis Maria Baca who make claim to said tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies; not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico, to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them. Provided, however, that the right hereby granted to said heirs of Baca, shall continue in force during three years from the passage of this act and no longer.

Under the direction of the Interior Department, the surveyor general made the survey of grant No. 4, of the heirs of Luis Maria Baca, in San Luis Valley of Colorado Territory.

On March 29, 1864, the surveyor general forwarded to the land office transcript of the field notes and plat of survey with his approval entered thereon. Receipt thereof was acknowledged by the land office by letter of date May 4, 1864, which was merely an acknowledgment of receipt of plat and survey.

Subsequently on January 14, 1868, application was made for patent and declined by the land office. The letter declining to issue the patent was based upon the fact that there was no provision made in the statute for the issuing of a patent and stating that a grant may be made by law as well as by patent pursuant to law, is undoubted.

The authority to the surveyor general was to select only non-mineral land and the defendants claim under a mineral location.

The certificate of the surveyor general to the patent was described, "subject to the conditions and provisions of Sec-

tion 6 of the act of Congress, approved June 21, 1860," which provided that the land should be vacant and non-mineral.

Mr. Justice Brewer, in the opinion at page 337, says:

"What is the significance of, and what effect can be given to the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of Congress? We are of the opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made."

Again, in the opinion at page 341, Mr. Justice Brewer says:

"But, it is said, no patent was issued in this case, and therefore the holding in the Barden case, that the issue of a patent puts an end to all question, does not apply here. But the significance of a patent is that it is evidence of the transfer of the legal title. There is no magic in the word "patent," or in the instrument which the word defines. By it the legal title passes, and when by whatsoever instrument and in whatsoever manner that is acomplished, the same result follows as though a formal patent were issued. *Rutherford* v. *Greene*, 2 Wheat. 196, 206; *Bryan* v. *Forsyth*, 19 How. 334; *Langdeau* v. *Hanes*, 21 Wall. 521, 531."

Again at page 342, Mr. Justice Brewer says:

"Here there had been no claim confirmed to any tract of land, but only the grant of a right to locate. In that respect it was like a land warrant, subject to location anywhere within the specified territory. As to land warrants, however, there is a specific provision for the issue of patents, Rev. Stat. Sec. 2423. The Land Department was, therefore, technically right when it said that the statute did not order the issue of a patent, and that the

case was one in which the granting act with the approved survey and location made a full transfer of title. Very likely if a patent had been issued the courts would not have declared it void, but have sustained it as the customary instrument used by government to make a transfer of the legal title."

In 3 Washburn on Real Property, Section 2024, the author says:

"A grant may be made by law, as well as by a patent issued pursuant to law; and a confirmation by law is as fully, to all intents and purposes, a grant, as if it contained in terms, a grant *de novo*. And such grant, or confirmation, vests an indefeasible and irrevocable title. And where a grant was made by the State of Pennsylvania to one upon his paying a certain sum after a survey made, it was held, that upon a return of such survey, and payment having been made, the title and legal possession of the land vested at once in the grantee."

The author in Section 2026 says:

"And yet it has been laid down that the granting of the patent is a ministerial act, and that it does not pass the title, but is merely evidence that it has before passed, a doctrine which gives to the entry and payment of the purchase-money, virtually, the effect of creating the title to lands purchased."

Potts v. *Gilbert*, 3 Wash. CC. 475; Fed. Case No. 11,347; 19 Fed. Cases, 1203. In the opinion at page 1204 Washington, Circuit Justice, says:

"The grant of land by the government passes at once to the grantee the legal possession, as well as the title; which continues, until he is disturbed by an actual adverse possession. This was decided in the case of *Greene* v. *Liter*, 8 Cranch (12 U. S.) 229."

The case of *Waterman* v. *Smith*, 13 Calif, 373, is a controversy arising between two claimants to Mexican land grants. One had been surveyed and located and the other had not. The court held in favor of the grantee whose location and survey had been duly made. In the opinion at page 419 the court says:

"The patent was not necessary to invest Ritchie with the title, as his title existed at the cession of the territory, and the only act to render it perfect to a defined

and particular tract was an official segregation. The title was recognized by the decree of final confirmation, and the approved survey attached it to the specific land. The essential and substantive acts under the law of 1851 were the confirmation and survey. The patent in such cases is only evidence of the pre-existing title made perfect by these acts. Upon the original grant, final confirmation, and approved survey, the plaintiffs might have relied, without reference to the patent. The survey following the final confirmation was made and approved in July, 1855. Ritchie died in July, 1856, and the patent bears date in January, 1857. At the date of the survey every substantial act required for the vesting of a perfect title had been performed. The subsequent issuance of a patent only involved duties of a mere ministerial character, and by a just application of the doctrine of relation, the patent must be regarded as if it had received the signature of the President at the completion of the segregation of the four leagues."

Roberts v. *Brooks*, from the Circuit Court of Appeals of the Second Circuit, 78 Fed. 411. The action was to compel specific performance by defendant of a contract for the purchase of a tract of land situated on Toms river, Ocean County, in the State of New Jersey. The answer denied that the complainant was seized in fee of the premises, or rather of certain substantial parts thereof, and that plaintiff was unable to give a good title.

The objection to the title urged seems to be an objection to the title derived from John B. Horton and Charles L. Davis under an act of the general assembly of the State of New Jersey, Section I. of which is as follows:

Section 1. "Be it enacted by the senate and general assembly of the State of New Jersey. That John B. Horton and Charles L. Davis be and they are hereby authorized and empowered to erect and maintain a dock or wharf in front of their lands on Toms river in the township of Dover, Ocean county, said dock or wharf to be built six hundred feet or more, at the option of the proprietors, along the channel of said river, and extending inland twenty-five rods, or as far as may be necessary for the improvement of the property of said proprietors or the benefit of commerce."

As to the objection to the title because there was no patent supplementing the act of the legislature, the court says:

"The objection that the legislative grant was not supplemented by a formal instrument bearing the seal of the state, etc., is frivolous." See *Rutherford* v. *Greene's Heirs*, 2 Wheat 196.

By the fourth objection it was urged that the language of the act above quoted did not convey a fee; that the dock or wharf erected under it became a public dock or wharf, which the public would have the right to use upon the payment of wharfage. By the whole case it was held that the act above recited operated as a conveyance of the dock and the right to conduct, maintain and operate the same, to the grantee named in the act and that such right passed to their assignees.

United States v. *Williamette Val. & C. M. Wagon Road Co., et al., 55 Fed. 711*, from the Circuit Court of the district of Oregon.

This was an action in equity to forfeit lands granted to the state of Oregon for the construction of a wagon road. In the opinion at page 717 Gilbert, Circuit Judge, says:

"The contention of counsel for the United States that the defendants could not have occupied the position of innocent purchasers so long as patents for the land had not issued, is not supported by the authorities. The grant was a grant *in praesenti*. The language of the granting clause was 'that there be and hereby is granted to the state of Oregon.' This made it a present grant of an estate in fee upon condition subsequent, notwithstanding the fact that the lands were required to be subsequently selected. *U. S.* v. *Wallamet Val. & C. M. Wagon Road Co.*, 42 Fed Rep. 357; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Missouri, K. & T. Ry. Co.* v. *Kansas Pac. Ry. Co.*, 97 U. S. 491; *Van Wyck* v. *Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336. Patent was not necessary to convey the title, and when it issued it was only evidence of a title that had already passed. *Rutherford* v. *Greene's Heirs*, 2 Wheat. 196; *Wright* v. *Rosenberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985; *Van Wyck* v. *Knevals*, *supra*."

Denny v. *Dodson, 32 Fed. 899.*

The railroad land grant of the Northern Pacific Railroad

Company was again under consideration, and Field, Circuit Judge, rendered the opinion of the court, holding that the grant was a grant *in praesenti;* that the act itself was a conveyance of the land, and, in discussing the question of patent in the opinion at page 904, the learned Judge says:

"Why, it is asked, is there a necessity of such patents, if the title passed by the act itself? There are many reasons why patents should be issued upon the completion of portions of the road. They would identify the lands which are coterminous with the road completed; they would be evidence that the grantee, in the construction of that portion of the road, had fully complied with the conditions of the grant, and to that extent the grant was relieved of possibility of forfeiture for breach of its conditions; and they would obviate the necessity of any other evidence of the grantees' title to the lands embraced in them. They would thus be deeds of further assurance confirmatory of the grantees' title, and so be invaluable to them as a source of quiet and peace in their possessions. The word 'confirming' is applied to such patents in section four. Words of sale and transfer, if used, would not change the character and operation of the patents. There are many instances in the reports where such effect—that is, as deeds of further assurance, or as evidence of the grantees' previous title—has been given to patents authorized or directed to be issued to parties, notwithstanding a previous legislative grant of the premises to them, or a confirmation to them of a previously existing title. The case of *Langdeau* v. *Hanes,* reported in 21 Wall. 521, is an instance of the latter kind. The supreme Court there said:

" 'In the legislation of congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government.' "

The court cites with approval *Wright* v. *Rosenberry, 121 U. S. 488,* and *Rutherford* v. *Greene's Heirs, 2 Wheat. 196,* quoting from and reviewing the latter case at length.

In the case of *Hall* v. *Jarvis, 65 Ill. 302.* The third syllabus at page 303 states the law as follows:

3. "The United States, or a State, may transfer its lands by a special act of legislation without the issue of a patent. So, where, by special act of Congress, land was granted to the State of Iowa, and the Governor selected the same under grant, it was held that a good title might be acquired without the issue of a patent, unless the act required one to be issued preliminary to the vesting of the title."

Ballance v. *Tesson, 12 Ill. 326.*

In this case the question of the effect of a legislative grant and the necessity for patent is discussed in the opinion at page 332 *et seq.,* by Treat, Chief Justice, as follows:

"Was the land covered by their claims subject to taxation for the year 1845? This presents the question, when the title vested in the claimants. We answer, on the approval of the survey in September, 1840. The grant then became operative and complete. The confirmees, or their legal representatives, were from that time invested with the full legal estate in the lots as surveyed. The issuing of patents was not necessary to transfer the titles. It had already passed out of the United States. The patents are but evidence of title in the patentees. The law is well settled that the government may make a perfect grant directly, and without the issuing of a patent or any other evidence of title. *An act of Congress, containing provisions clearly indicating an intention to pass the fee unconditionally and absolutely, operates ipso facto to vest the title in the grantee.* A reference to one or two adjudged cases in the Supreme Court of the United States, upon grants made by the government will fully establish the position. In *Grignon's Lesse* v. *Astor,* 2 Howard 319, it was decided that an act of congress requiring patents to be issued to persons 'whose claims are contained in the report transmitted to the secretary of the treasury, and which have been reported favorably on by said commissioners; and such persons are hereby confirmed in their claims, agreeably

to any surveys heretofore made, or the lines and boundaries established by the claimants respectively,' vested the legal estate presently in the confirmees. The court said: 'But the title became a legal one by its confirmation by the act of Congress of February, 1823, which was equivalent to a patent. It was higher evidence of title, as it was the direct grant of the fee which had been in the United States, by the government itself, whereas the patent was only the act of its ministerial officers.' In *Strother* v. *Lucas*, 12 Peters 410, the court remarked: 'That a grant may be made by a law, as well as a patent pursuant to a law, is undoubted; and a confirmation by a law is as fully to all intents and purposes a grant as if it contained in terms a grant *de novo*.' The act of the third of March, 1823, provides: 'That there is hereby granted to each of the French and Canadian inhabitants and other settlers in the village of Peoria, in the State of Illinois, whose claims are contained in a report made by the register of the land office at Edwardsville, in pursuance of the act of Congress, approved May the fifteenth, one thousand eight hundred and twenty, and who had settled a lot in the village aforesaid, prior to the first day of January, one thousand eight hundred and thirteen, and who have not heretofore received a confirmation of claims, or donation of any tract of land or village lot from the United States, the lot so settled upon and improved.' This portion of the act contains words of present grant, and in connection with the further provision directing the lots to be surveyed, manifests a clear intention on the part of congress to vest the title absolutely in the claimants on the completion of the survey. Patents were required to be issued not for the purpose of transferring the fee, but merely as evidence that the title had passed to the patentees."

Stockton v. *Williams, 1 Doug. (Mich.) 546,* is a case involving the construction of a treaty between the United States and the Chippewa Indians concluded September 24, 1819, and referred to in the opinion as the Saginaw Treaty. The first, second, third and fourth *syllabi* state the law as follows:

1. "The reservation by the treaty between the United States and the Chippewa Indians, made at Sag-

inaw, September 24, 1819, of certain designated quantities of land, to be located as the President of the United States might direct, for the use of persons therein named, and their heirs, was a reservation of an estate in fee simple, to each of the individual reservees."

2. "The treaty itself operated as a grant of land to each of the several reservees, which became perfect when the land was located under the direction of the President of the United States, and no patent was necessary to perfect the title."

3. "*Held*, That a patent issued by the President to a person claiming to be one of the reservees, was void, and could in no wise affect the title of the reservee under the treaty."

4. "Lands may be granted by act of congress, or by treaty, as well as by patent."

The learned Judge, in the opinion at page 558 *et seq.*, discusses the questions here involved so clearly that we take the liberty of quoting from his opinion at length, as follows:

1. "The first question to be determined is, what estate passed to the reservee under the treaty? The third article is in the following words: 'There shall be reserved for the use of each of the persons herein after mentioned, and their heirs, which persons are all Indians by descent, the following tracts of land,' etc. 'For the use of Mokitchenoqua, six hundred and forty acres of land, to be located at and near the Grand Traverse of the Flint river, in such manner as the President of the United States may direct.

"It is very clear that, if a fee simple estate was intended to be granted, the parties to the treaty were unfortunate in the choice of terms by which to give effect to that intention; and yet it is difficult to conceive that any other estate was in the contemplation of the parties at the time of its execution. Will, then, the third article warrant such a construction? It will be observed that the reservation is to the use of Mokitchenoqua and her heirs. No limitation as to the time of holding, or restriction upon the right of alienation, is contained in the grant. The use of the word heirs clearly implies that such an estate was granted as would, upon her death, descend to her legal representatives. Here, then, are all

the essential elements of a fee simple estate. This construction, we think, is justified by the words of the third article, and is strengthened by the fact that it corresponds not only with an opinion given by the Attorney-General of the United States, to the Secretary of War (Land Laws, part 2, pp. 96-7), but with the opinion of the senate, a branch of the treaty-making power, which is certainly entitled to great consideration; 3d vol. Senate Doc. 1836, No. 197. A further confirmation of this view may be found by a reference to the numerous treaties made between the United States and the various Indian tribes. In the treaty with the Chickasaw Nation, the grant to various persons therein named is in these words: 'One tract of land for the use of Col. George Cobert and heirs,' etc. In the treaty with the Osage tribe of Indians, the form of expression is as follows: 'From the above lands ceded and relinquished, the following reservations, for the use of the half-breeds shall be made.' But it is useless to multiply authorities upon a question which would seem to admit of little or no doubt. I have not been unmindful of the circumstances referred to by counsel, that in other treaties with the Indian tribes, other forms of expression are made use of, such as, for instance, 'there shall be granted,' etc.; and 'the United States agree to grant, by patent, in fee simple,' etc. But we regard the use of such terms as the effect, rather of accident, than design; and in giving a construction to the treaty, we are to be guided by the obvious intention of the parties, and to give effect to such intention. That the intention was to grant to the reservees named in the third article of the treaty of Saginaw, a fee simple estate, in the lands therein mentioned, we have no doubt.

2. "The second question to be decided is, whether the treaty operated as a grant, or whether a patent was necessary to convey the title. This constitutes and interesting feature in the case before us, and was argued with much ability by counsel on both sides; and yet, upon a critical examination of the question, we find no difficulty in arriving at a conclusion entirely satisfactory to our own minds.

"It was urged by counsel for the complainants that, until the patent issued, the fee was in the government. The power of the government to grant the soil while in possession of the Indians, and subject to their right of occupancy, is a proposition which has long since been settled by a series of decisions of controlling authority. It is equally well established that the Indians do not possess the power to dispose of the soil at their own will, to whomsoever they please; upon the principle 'that discovery gave exclusive title to those who made it,' and to the discoverers belonged the exclusive right of purchasing from the natives: 8 Wheat. 543, 6 Pet. 515. In furtherance of the policy pursued by the United States since its existence as a separate and independent government, a treaty was entered into with the Indians at Saginaw, the object of which was to extinguish their title to the country therein described. Here, then, were two parties capable of contracting, the one having the legal title and ultimate right to the land which was the subject of the contract; the other having the right of possession or occupancy, which has always been respected. The first article cedes to the United States land comprehended within certain defined boundaries. The second article reserves from the operation of the first certain tracts of land for use of the Chippewa Nation. The third article makes specific reservations in favor of certain persons of Indian descent. The right of the Indians to the lands described in the second article was neither enlarged nor restrained by its provisions. It left that right precisely as it stood before the cession contained in the first article.

"We have already said that the third article contained a grant in fee simple, to the reservees therein named, and we are now to determine whether the treaty operated as a present grant or conveyance to the reservees, or whether further action was required on the part of the government to perfect the title of the reservees to the lands reserved in that article. If it shall appear that the treaty itself operated as an absolute relinquishment of the right, title and interest, as well of the government as of the Indians, to the lands therein described, then it will follow as a corollary to this proposi-

tion that the issuing of a patent to the reservees was unnecessary, and could confer no other or further rights upon them than were conferred by the treaty itself, and that each must look to the treaty as the source and basis of title to the lands reserved to them respectively. The right of the government to make a grant of lands either by treaty or act of Congress is as unquestionable as the right to make a grant by patent issued by the President when duly authorized by law. What, then, is the true construction of the treaty in this particular? It is admitted that the language of the third article is somewhat ambiguous, and admits of a twofold construction. In such case it is the duty of the court to give effect to the intention of the parties to the treaty, provided we can discover what that intention was from the article itself, a resort to extrinsic evidence being inadmissible under the rules of law. It was not denied that the article in question operated as an absolute extinguishment of the right which the Chippewas, as a nation, had in the land reserved to the several individuals named in that article. No other or further act on their part was necessary to divest them of their pre-existing right of occupancy, or to invest the reservees, respectively, with all the rights which they, as a nation, had before the ratification of the treaty. Being a party to the treaty, the United States sanctioned, by a solemn act, the alienation by the nation to the several reservees therein named. If such was the legal operation of the treaty in respect to one of the parties, it is difficult to conceive why a like effect may not be given to it with respect to the other. If it operated as a present grant of the rights of the one, to the land in controversy, why may it not be so construed as to have a like operation as to the other? Let us examine, for a moment, the effect of a contrary construction of the treaty; let us see to what consequences it would lead. If the treaty did not, of itself, operate as a present grant to the several individual reservee, in whom, it may be asked, is the title to the tract in controversy? Not in the Indians; for it is admitted that they parted with their interest by the treaty. Not in the government, for it reserved for the use of Mokitchenoqua and her heirs,

and is, therefore, excluded from the operation of Article First. But it may be said that the title is in the grantees of Mokitchenoqua, to whom a patent issued. But this presupposes a power on the part of the President to issue a patent for the land in question. Did this power exist? If it did, its existence must be shown; for it will hardly be contended that, under our form of government and system of laws respecting the public domain, it is competent for the President to issue a patent without the authority of law. The authority to issue patents is not inherent in the president, but belongs to Congress, who have the sole power to determine by whom, and to whom, and upon what conditions, they shall be issued, and to declare their dignity and effect. The third article of the treaty of Saginaw does not provide that a patent shall issue; and no act of Congress has been produced authorizing the President to issue patents to the several reservees named in that article. We are bound, therefore, to suppose that the patent issued without any authority, derived either from the treaty or any act of Congress designed to carry into effect its provisions, and is, therefore nugatory and void. If this train of reasoning be correct, it would result that the reservee, Mokitchenoqua, or her assigns, is vested with no other or greater right in the lands in question than belonged to the Chippewa Nation before the ratification of the treaty. And, as Congress has passed no law to carry into execution the provisions of the treaty, by authorizing the President to issue patents to the individual reservees, it would follow that the government has never parted with the legal title to the tract in question. But we are bound to resist a construction that would lead to such absurd consequences, if another one, more rational, and warranted by the language of the third article can be adopted.

"The phraseology of the third article might warrant the inference that some legislation was necessary on the part of the government to perfect the titles of the reservees in the treaty. The words, 'there shall be reserved,' would seem to imply that something further was to be done to perfect the rights acquired under the treaty. But when it is considered that a quarter of a century has elapsed since the treaty was ratified, with-

out any action on the part of Congress, in reference to the grants made by the third article, it is almost a necessary inference that the Government have given to the treaty the construction contended for by the defendants that, in respect to such grants, it executed itself. This view derives additional confirmation from the action of the Senate, on the report of Judge White, to which I have already adverted.

"We think the view we have thus taken cannot be overthrown by the fact that the lands granted to Mokitchenoqua were to be located 'at and near the Grand Traverse of the Flint river, in such manner as the President of the United States may direct.' The location of the lands became a duty devolving on the President by the treaty. This duty he could execute without an act of Congress; the treaty, when ratified, being supreme law of the land, which the President was bound to see executed. It was impossible to describe the tract granted to any of the reservees in the treaty, as it is a matter of history that none of the lands ceded had ever been surveyed. But locality is given to the grant by the terms of the treaty,with an authority to locate afterwords by a survey making it definite.—10 Pet., 331. This authority being executed, the grant then became as valid to the particular section designated by the President as though the description had been incorporated in the treaty itself. We are, therefore, of opinion that a fee simple passed to the reservee, Mokitchenoqua, by force of the treaty itself, and that the rights of the parties could in no wise be affected by the subsequent act of the President directing a patent to be issued."

This case also appears in 1 Walker Chancery 120, and this case and the report of the same case in Walker's Chancery is approved and each case quoted from at length in *Francis* v. *Francis, 203 U. S. 233.* Opinion at page 238 *et seq.* In *Francis* v. *Francis* the second syllabus is as follows:

"A patent to an Indian of land reserved to him by a treaty simply locates the land, the title to which passed under the treaty, and in the absence of any provision of the treaty, or any act of Congress, a restriction in the patent against alienation without the consent of the President is ineffectual, the President having no author-

ity by virtue of his office to impose such a restriction."
Challefoux v. *Ducharme et al., 4 Wis. 554.*

By act of Congress February 12, 1823, a tribunal was instituted for the purpose of ascertaining and deciding upon the rights of persons claiming lands at Green Bay, Prairie du Chien and the county of Michilimackinac.

The commissioners made report to Congress which provided the awarding of the same tract of land to two persons —Pierre Challefoux and Susan La Rose, or Susan Ducharme.

The fifth section of the act providing for the appointment of commissioners is as follows:

> "That every person who, on the first day of July, one thousand eight hundred and twelve, was a resident of Green Bay, Prairie du Chien, or within the county of Michilimackinac, and who on the said day occupied and cultivated, or occupied a tract of land, which had previously been cultivated by said occupant, lying within either of said settlements, and who has continued to submit to the authority of the United States, or the legal representatives of every such person, shall be confirmed in the tract so occupied and cultivated."

Claims were made before the commissioners by Pierre Challefoux and by Susan Ducharme, and the commissioners decided in favor of both claims and confirmed them, and in their report recommended both for confirmation.

Congress by act approved April 17, 1828, "confirmed the claims purporting to be confirmed or recommended for confirmation by the commissioners."

A patent for the land was issued to Susan La Rose, November 5, 1829. No patent was issued to Challefoux. The controversy was between the heirs or grantees of Pierre Challefoux and Susan La Rose.

At page 562 the court has this to say:

> "Considering, then, the decision of the commissioners, and the confirmation of that decision by Congress as conclusive of the rights of the parties, how, then, does this case stand? Challefoux and La Rose make a claim to the same tract of land. The claims of both were confirmed by the commissioners, and recommended for confirmation in their report. Congress, acting upon their

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report, also confirms the claim. In other words, grants the land to two persons equally competent to take under the grant. For it has been held that a grant may be made by a law as well as by a patent pursuant to law, and that a confirmation by law is as fully, to all intents and purposes, a grant as if it contained in terms a grant *de novo*. 12 Peters 454; 2 Howard 372. Such being the case, Challefoux and aL Rose took each an undivided moiety of the land as tenant in common."

It was held by the court that both of the claimants took the land under the act of Congress as vendees in common and the title under the grant or the patent inured to their common benefit.

Megerle v. *Ashe et al.*, 27 Calif. 322.

There was under consideration a grant to the State of California under an act of Congress providing "there shall be and hereby is granted to each new state that shall be hereafter admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such State before its admission and while under a Territorial Government, for purposes of internal improvements, as aforesaid, as shall make five hundred thousand acres of land, to be selected and located as aforesaid."

Upon admission of the State of California the lands were selected by the state—defendants claim under patent from the state, plaintiffs claim under patent from the United States—the question involved was whether or not the act of Congress above cited was a grant *in praesenti*.

The first and second *syllabi* state the law as follows:

"A legislative grant is as effectual to past title to lands owned by the Government as a grant evidenced by a patent."

"A patent is not conclusive, as evidence of title, as against a grant made by the legislative department, prior to the patent."

In the opinion, at page 328, cases of *Lessieur* v. *Price*, 12 How. 59; *Rutherford* v. *Greene's Heirs*, *2 Wheat. 196*, are cited and followed.

The C., R. I. & P. R. R. Co. v. *Brown, et al.*, 40 Ia. 333, is a case involving the construction of the swamp land act and holds that the act operated to convey present title without

patent or formal conveyance, and further held that in the absence of the patent, parol evidence is admissible to show that land claimed to be swamp is embraced within the grant to the state.

In the opinion at page 334 *et seq.* the court cites with approval the cases of *Fremont* v. *United States,* 17 Howard 542; *Rutherford* v. *Green's Heirs,* 2 Wheat. 196, and says:

> "It is a well-recognized rule that a legislative grant of lands will pass the title to the grantee without a patent or formal conveyance."

Courtright v. *The Cedar Rapids & Missouri River R. R. Co. et al., 35 Ia. 386,* was a construction of a grant to the State of Iowa to aid in the construction of certain railroads. The court held that it was a grant *in praesenti,* and, on the question of the necessity of patent, at page 399, the Chief Justice treats the question as follows:

> "The act of Congress granting the lands to the State and the State law conferring them upon the Iowa Central Air Line R. R. Co., was sufficient after selection provided for to pass the title and vest it in the railroad corporation without any further assurance. The legislative act of the sovereign power is just as effective for that purpose as could be any formal conveyance executed by its officers. And so it has been repeatedly held. Laws of Congress and of the States, treaties and grants by the proper authorities, have been held sufficient evidence of titles without other assurances. *Lessieur et al.* v. *Price,* 12 How. 59; *Rutherford* v. *Green's Heirs,* 2 Wheat. 196; *The United States* v. *Perchman,* 7 Pet. 51; *Mitchell et al.* v. *The United States,* 9 Id. 711; *Ladyae* v. *Roland et al.,* 2 How. 581; *United States* v. *Brooks* et al., 10 Id. 442."

Lessieur et al. v. *Price, 42 How. 59.*

Congress by act of March 6, 1820, provided as follows:

> "Four entire sections of land be, and the same are hereby granted to said State (the State of Missouri) for the purpose of fixing their seat of government thereon, which said sections shall, under the direction of the Legislature of said State, be located, as near as may be, in one body at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States, provided that such lo-

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cations shall be made prior to the public sale of the lands of the United States surrounding such location."

In the syllabus referring to the grant it is stated:

"This grant did not need an application to an officer of the United States for permission to locate it. When the Legislature selected the land, and gave notice thereof to the Surveyor-General and Recorder of the Land District, the land became identified and the title complete."

In the opinion at page 76 the court says:

"The land was granted, by the act of 1820; it was a present grant, wanting identity to make it perfect; and the Legislature was vested with full power to select and locate the land; and we need only here say what was substantially said by this court in the case of *Rutherford* v. *Green's Heirs* (2 Wheat. 196), that the act of 1820 vested a title in the State of Missouri, of four sections; and that the selection made by the State Legislature pursuant to the act of Congress, and the notice given of such location to the Surveyor-General, and the Register of the local district where the land lay, gave precision to the title, and attached to it the land selected."

Wirth v. *Branson, 98 U. S. 118.*

The decision of this case is set forth in the syllabus as follows:

"1. Where, in ejectment, it appeared that a location of a military bounty land warrant, duly made by A. on the demanded premises, the same being a part of the surveyed public land of the United States, had not been vacated or set aside, *Held*, that a subsequent entry of them by B. was without authority of law, and that a patent issued to him therefor was void.

"2. A party who has complied with all the terms and conditions which entitle him to a patent for a particular tract of public land acquires a vested interest therein, and is to be regarded as the equitable owner thereof. While his entry or location remains in full force and effect, his rights thereunder will not be defeated by the issue of a patent to another party for the same tract."

Doe, Ex Dem, v. *Wilson, 23 How. 457.*

A case where reservation was made in a treaty with the

Pottawatomie Indians in 1832, in favor of certain individual Indians, the lands thereafter to be selected by the President of the United States. Before the selection, the Indian sold and conveyed his interest in the lands.

The syllabus correctly states the decision of the court, as follows:

"In a treaty made with the Pottawatomie Indians in 1832, there were reservations to individual Indians, which should be selected under the direction of the President of the United States, after the land shall have been surveyed, and the boundaries shall correspond with the public surveys.

"Before this was done, one of the reservees made a conveyance by a deed in fee simple, with a clause of general warranty. In 1837 patents were issued for the reservations.

"This deed vested the title of the reservee in the grantee. The former was a tenant in common with the United States, and could sell his reserved interest; and when the United States selected the lands reserved to him, and made partition (of which the patent is conclusive evidence) his grantee took the interest which the reservee would have taken if living."

Jones v. *Meehan, 175 U. S. 1.*

A case arising out of reservations in treaty made with the Chippewa Indians in the State of Minnesota.

The first, third and fourth points of the syllabus are responsive to the subject here under discussion, and state the law as follows:

"A good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress, or any patent from the executive authority of the United States. The question in every case is whether the terms of the treaty are such as to manifest the intention of the parties to make a present grant to the persons named.

"When the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land, whether

already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation.

"The effect of the treaty of October 2, 1863, between the United States and the Red Lake and Pembina bands of Chippewa Indians, by which those bands ceded to the United States all their right, title and interest in a large tract of country, and by which 'there shall be set apart from the tract hereby ceded a reservation of six hundred and forty acres near the mouth of the Thief river for the Chief Moose Dung,' was to grant him an alienable title in fee in the quantity of land at the designated place, subject only to its selection in due form, and to the definition of its boundaries by survey and patent."

In the opinion at page 10 Mr. Justice Gray, speaking for the court, has this to say:

"It is well settled that a good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe without any act of Congress, or any patent from the Executive authority of the United States. *Johnson* v. *McIntosh,* 8 Wheat., above cited; *Mitchell* v. *United States,* 9 Pet. 711, 748; *Doe* v. *Beardsley,* 2 McLean, 417, 418; *United States* v. *Brooks,* 10 How. 442, 460; *Doe* v. *Wilson,* 23 How. 457, 463; *Crewa* v. *Burcham,* 1 Black 356; *Holden* v. *Joy,* 17 Wall. 211, 247; *Best* v. *Polk,* 18 Wall. 112, 116; *New York Indians* v. *United States,* 170 U. S. 1. The question in every case is whether the terms of the treaty are such as to manifest the intention of the parties to make a present grant to the persons named."

Briggs v. *Wash-Uk-Qua, 37 Fed. 135.*

Under a treaty with the Kickapoo Indians of June 28, 1862, and under an act of Congress of August 4, 1886, it was the duty of the Secretary of the Interior to issue the patents when the allottee under the treaty of 1862 had died without

receiving a patent for his land, patent to be issued to the original allottee and to inure to the heirs.

Before receiving the patent the heir conveyed the land and the conveyance was upheld by the Circuit Court District of Kansas, and in the opinion at page 136 *et seq.* the rule is stated as follows:

> "The right to the patent was absolute and complete, and the duty of the Secretary of the Interior to issue the patent was imperative. Mr. Justice Field, in *Stark* v. *Starrs*, 6 Wall. 418, says:
>
> " 'The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants.'
>
> "If the patent relates back to the inception of the right to it to cut off intervening claimants, with equal reason and justice it must relate back to estop the patentee from asserting title against his grantee under warranty deed made before the patent actually issued, and after his right to it had become absolute. In *Langdeau* v. *Hanes*, 21 Wall. 530, the court uses the following language:
>
> " 'A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectively as a grant or quit claim from the government * * * If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title.' "

It would hardly seem necessary to present additional authorities upon the question at issue in this case. There is absolutely no conflict of authorities that when an Indian allottee or other grantee of the government becomes entitled to a patent under a law, that law is equivalent to the patent.

We do not deem it material in a discussion of this question whether the defendant Rowell in this case, by the act of June 17, 1910, was vested with the legal title or only an equitable title.

An equitable title in the lands is as much subject to the

protection of the due process clause of the Fifth amendment as a legal title.

Congress has already declared the defendant Rowell for all the purposes of this case, a Kiowa Indian. They had directed the Secretary of the Interior to enroll and allot him as such, giving him as an adopted member of the Kiowa tribe the full rights of members of that tribe.

The act of June 17, 1910, clearly shows the intention of Congress to give and grant to Rowell the lands described, which were described. The kind of title is mentioned—a fee simple title.

The record shows that the Secretary of the Interior did that which he was directed by Congress to do, viz.: he had put in motion the machinery for the execution and delivery of the patent by written order to the commissioners of the General Land Office. Any other action taken by the Secretary of the Interior would be in violation of the mandate of Congress.

From the light shed upon this transaction by the decisions of the courts we assert that the title passed to James F. Rowell by the act of Congress of June 17, 1910.

III.

Congress Has No Power to Destroy a Vested Right.

It is alleged by the plaintiff in its reply that the act of June 17, 1910, so far as the defendants are concerned, was a mere gratuity to James F. Rowell; that the grant was without consideration; that it required the patent to perfect the title in James F. Rowell, and that, therefore, until the patent issued Congress had the right to repeal the act and destroy the grant.

The plaintiff also attempts to charge that the passage of the act of June 17, 1910, was fraudulently obtained. We believe this is stating the contention in the court below as strongly as these considerations were there urged by the plaintiff.

Scanning the evidence, there is not a syllable of proof that any representations were made to the Congress or to any individual Senator or member of the House as to the value of the land. There is in the record a mass of incompe-

tent testimony which the court disregarded, some statements as to the value of the land and requests from a political standpoint to the Secretary of the Interior to withhold the issuance of the patent. It is said that there is one who knows everything, from whom nothing can be concealed, and so far as these defendants are concerned, we would be glad if this Court could be endowed with the same omnipotent power to look through the transaction and ascertain the truth. It is not our province or right to here criticise those in high public stations, yet we have felt it not amiss to make this declaration as an answer to the attempted aspersions upon our title.

In the first place, the consideration for the grant is found in the surrounding circumstances in proof of the case and uncontroverted. The service of Dr. Rowell to the Indians, his long life with them, his marriage into the tribe and raising children by his Indian wife, his adoption into the Kiowa Tribe, the passage of the Act of April 4, 1910, all furnish a legitimate consideration for the legislation. It is not a mere gratuity without consideration; besides a legislative grant presumes a consideration:

In Vol. 14, A. & E. Cyc. of Law, gratuity is defined as follows:

> "A gratuity is something given freely, or without recompense; a free gift; a present; a donation."

In *Griffin* v. *Hopkins,* Walker (Miss.) 50, it was said:

> "Gratuitous means voluntary, that is, without authority of law—not the common acceptance of the term, a gift, without consideration or merit."

Again, the Congress is a legislative body, it is not a judicial body. It has no authority or power to sit in judgment on the vested rights of individuals, and when it undertakes by a legislative decree to destroy vested rights, it is wrongfully assuming the powers of a court of equity, and the constitution restrains the exercise of judicial power by the Congress.

Fletcher v. *Peck, 6 Cranch, 87.* In the opinion at page 131 *et seq.,* Chief Justice Marshall discusses the question here involved as follows:

> "The fourth covenant in the deed is, that the title to the premises has been in no way, constitutionally or legally, impaired by virtue of any subsequent act of any subsequent Legislature of the State of Georgia.

"The third count recites the undue means practiced on certain members of the Legislature, as stated in the second count, and then alleges that, in consequence of these practices, and of other causes, a subsequent Legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the state to the lands it contained. The count proceeds to recite at large this rescinding act, and concludes with averring that by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired and rendered null and void. * * *

"If the Legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case; yet there are certain great principles of justice whose authority is universally acknowledged, that ought not to be entirely disregarded.

"If the Legislature be its own judge in its own case, it would seem equitable that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will."

Terrett et al. v. *Taylor, et al., 9 Cranch 43,* in which the opinion was written by Mr. Justice Storey. A case involving the rights of the Protestant Episcopal Church, commonly called the Episcopal Church of Alexandria, in the parish of Fairfax, in a controversy between the vestrymen and trustees of the church and the overseers of the poor. In the opinion at page 49 *et seq.* the Court discusses the question involved as follows:

"Be, however, the general authority of the Legislature as to the subject of religion as it may, it will require other arguments to establish the position that, at the revolution, all the public property acquired by the Episcopal churches, under the sanction of the laws, became

the property of the state. Had the property thus acquired been originally granted by the State or the King, there might have been some color (and it would have been but a color) for such an extraordinary pretension. But the property was, in fact and in law, generally purchased by the parishioners, or acquired by the benefactions of pious donors. The title thereto was indefeasibly vested in the churches, or, rather, in their legal agents. It was not in the power of the crown to seize or assume it; nor of the parliament itself to destroy the grants, unless by the exercise of a power the most arbitrary, oppressive and unjust, and endured only because it could not be resisted. * * *

"If the Legislature possessed the authority to make such a grant and confirmation, it is very clear in our minds that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine would uproot the very foundations of almost all the land titles in Virginia, and is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizen in the free enjoyment of their property legally acquired."

Mr. Cooley, in his work on *Constitutional Limitations, 7th Ed., 502, et seq.*, discusses the question of what is the "law of the land" or "due process of law" as follows:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry ,and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land.

"The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry' and 'render judgment only after trial.' It is entirely correct, also, in assum-

ing that a legislative enactment is not necessarily the law of the land. The words 'by the law of the land,' as used in the Contsitution, do not mean a statute passed for the working of wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses, "You shall be vested with the legislative power of the state, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.' When the law of the land is spoken of, 'undoubtedly a pre-existing rule of conduct' is intended, 'not an *ex post facto* rescript or decree made for the occasion. The design 'is' to exclude arbitrary powers from every branch of the government; and there would be no exclusion if such rescripts or decrees were to take effect in the form of a statute."

Mr. Webster in his great argument in the *Dartmouth College Case, Works of Webster, Vol. 5, page 500,* states the question here under consideration as follows:

"But this argument from necessity would equally apply in all other cases. If it be well founded, it would prove that whenever any inconvenience or evil is experienced from the restrictions imposed on the Legislature by the Constitution, these restrictions ought to be disregarded. It is enough to say that the people have thought otherwise. They have most wisely chosen to take the risk of occasional inconvenience from the want of power, in order that there might be a settled limit to its exercise, and a permanent security against its abuse. They have imposed prohibitions and restraints; and they have not rendered these altogether vain and nugatory by conferring the power of dispensation. If inconvenience should arise which the Legislature cannot remedy under the power conferred upon it, it is not answerable for such inconvenience. That which it cannot do within the limits prescribed to it, it cannot do at all. No Legislature in this country is able, and may the time never come when it shall be able, to apply to itself the memorable expres-

sion of a Roman pontiff: *'Licet hoc de jure non possumus, volumus tamen de plentitudine potestatis.'* "

In the case of *Reed* v. *Wright, 2 G. Greene* (Iowa), *15,* involving the validity of legislation in violation of the organic act of the Territory of Wisconsin and Iowa Territory, attempting to do away with the right of trial by jury. In the opinion at page 22 is this terse statement of the principles here involved.

> "The great landmark of national liberty, trial by jury, and judicial proceedings according to the course of the common law, so wisely secured to the inhabitants of the territory by the ordinance, were insuperable barriers against legislative attempt to take from the citizen the benefit of the writ of *habeas corpus* as to forbid the right of trial by jury, and as well deny him religious freedom as to attempt to divest him of his property without judicial proceedings according to the course of the common law. Hence all legislation in derogation of these rights is unconstitutional and void."

Ervine's Appeal, 16 Pa. St. 256. Coulter, J., at page 263, *et seq.,* discusses the question as follows:

> "The Constitution of the United States ordains 'that no person shall be deprived of life, liberty, or property, without due process of law,' and the constitution of this state contains an equivalent provision in words nearly alike.
>
> "It is an affirmation of a great doctrine contained in Magna Charta: 'neither will we pass upon any one but by the lawful judgment of his peers or by the law of the land.' And Lord Coke says that the words '*per legem terrae,*' mean, by due process of law, and being brought into court to answer according to law. The whole clauses in our constitutions on the subject were established for the protection of personal safety and private property. These clauses address themselves to the common sense of the people, and ought not to be filed away by legal subtleties. They have their foundation in natural justice, and, without their pervading efficacy, other rights would be useless. If the legislature possessed an irresponsible power over every man's private estate, whether acquired by will, by deed, or by inheritance, all inducement to acquisition, to industry and economy would be removed.

The principal object of a government is the administration of justice and the promotion of morals. But if property is subject to the caprice of an annual assemblage of legislators acting, tumultuously, and without rule or precedent, and without hearing the party, stability in property will cease, and justice be at an end. If the government is interdicted from taking private property even for public use without just compensation, how can the legislature take it from one man and dispose of it as they think fit. The great principle is, that a man's property is his own, and that he shall enjoy it according to his pleasure (injuring no other man) until it is proved in a due process of law that it is not his, but belongs to another."

Taylor v. *Porter, 4 Hill (N. Y.) 140.* The question of legislative power is here discussed by Benson, J. at page 144, as follows:

"Under our form of government the Legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the state who transcends his jurisdiction, are utterly void. Where, then, shall we find a delegation of power to the Legislature to take the property of A and give it to B, either with or without compensation? Only one clause of the Constitution can be cited in support of the power, and that is the 1st Section of the 1st Article, where the people have declared that 'The Legislative power of this State shall be vested in a Senate and Assembly.' It is readily admitted that the two Houses, subject only to the qualified negative of the Governor, possess all 'the legislative power of this State'; but the question immediately presents itself, what is that 'legislative power,' and how far does it extend? Does it reach the life, liberty or property of a citizen who is not charged with a transgression of the laws, and when the sacrifice is not demanded by a just regard for the public welfare?" * * * * * * *

The Court then quotes at length from the opinion of

Story, Justice, in *Wilkinson* v. *Leland*, 2nd Peters, 657, and proceeds as follows:

"The security of life, liberty and property, lies at the foundation of the social compact; and to say that this grant of 'legislative power,' includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consideration had clothed the Legislature with despotic power, and such is the extent of their authority if they can take the property of A, either with or without compensation, and give it to B. 'The Legislative power of this State,' does not reach to such an unwarrantable extent. Neither life, liberty, nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of the power. Such, at least, are my present impressions.

"But the question does not necessarily turn on the section granting legislative power. The people have added negative words, which should put the matter at rest. 'No member of this State shall be disfrnachised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.' Const., Art. 7, Sec. 1. The words 'by the law of the land,' as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two Houses: 'You shall be vested with "the legislative power of the State"; but no one "shall be disfranchised, or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose"; in other words: "You shall not do the wrong, unless you choose to do it."' "

Wilkinson v. *Leland, 2 Peters 625.* In the opinion at page 657, Mr. Justice Story delivering the opinion, makes this statement of the law:

"That government can scarcely be deemed to be

free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them, a power so repugnant to the common principles of justice and civil liberty; lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expresions of such an intention. In *Terret* v. *Taylor,* 9 Cranch. 43, it was held by this Court that a grant or title to lands once made by the legislature to any person or corporation is irrevocable, and cannot be re-assumed by any subsequent legislative act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizen to the free enjoyment of their property lawfully acquired. We know of no case, in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. We are not prepared therefore to admit that the people of Rhode Island have ever delegated to their legislature the power to divest the vested rights of property, and transfer them without the assent of the parties.' "

Upon this question, in discussing the power of the State of Georgia to impair the obligation of a contract, in *Fletcher* v. *Peck, supra,* Mr. Chief Justice Marshall has this to say:

"Does the case now under consideration come within this prohibitory section of the constitution?

"In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

"A contract is a compact between two or more

parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert their right. A party is, therefore, always estopped by his own grant.

"Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

"If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from imparing the obligations of contracts between two individuals, but as excluding from that inhibition contracts made with itself.

"The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made, with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

"Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the

framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state."

It is true that this discussion by Mr. Justice Story, which is quoted at length by Mr. Cooley in his work on Constitutional Limitation, is based upon that provision of the Federal Constitution prohibiting the State to impair the obligation of contracts, yet, as is said by Mr. Cooley, a conveyance being an executed contract, it is evident that such conveyance vests in the grantee a title to the land. That title being property, it can no more be taken by the government without due process of law, than the state could deprive the owner thereof by passing a law annulling its contract.

In *Lewis Southerland Statutory Construction, Vol. 1, Section 284,* the author says:

"When a right has arisen on a contract, or a transaction in the nature of a contract authorized by a statute, and has been so far perfected that nothing remains to be done by the party asserting such right, the repeal of the statute will not affect it or an action for its enforcement. It has become a vested right which stands independent of the statute." * * * * * * *

In the same section the author further says:

"Rights that pass and become vested under the existing law are supposed to be beyond the control of the state through its legislature. A mere change of the law does not divest or impair rights of property acquired previously, even though the legislature intended the new law so to operate. A law can be repealed by the law giver; but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute injustice to abolish with a law all the effects which it had produced. This is a principle of general jurisprudence; but a right to be within its protection

must be a vested right. It must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another."

In the case at bar the act of June 17, 1910, vested not only the equitable but the legal title in James F. Rowell and the Congress cannot sit in judgment upon his vested rights and by judicial decree annull the grant and deprive him of his property.

In effect, one of the contentions of the plaintiff is that the passage of the act of June 17, 1910, was fradulently obtained. The allegations of plaintiff's reply are vague as far as this contention is concerned and the proof is entirely barren of any representations or fradulent inducement held out to the members of the Congress to secure the passage of the act. But even if this were true, it would not affect the validity of the grant and even the courts would not inquire into the motives which prompted the legislature in its action or the inducements upon which it acted.

In *Lewis Sutherland Statutory Construction, Vol. 1, Section 84,* this question is discussed as follows:

"An act will not be declared invalid because its passage was procured by fraud and imposition practiced on the legislature, or because it was the result of a conspiracy between members of the legislature and outside parties, or of improper motives actuating the legislature. The courts will not inquire into charges of this nature, and will conclusively presume that the legislature acted honestly and understandingly. In one case it is said that 'the motives which induced legislative action are not a subject of judicial inquiry; and a legislative act cannot be declared unconstitutional because, in the opinion of a court,it was or might have been the result of improper considerations. A court is neither a director of the discretion of a legislator, nor the keeper of his conscience.' Much less would the Congress have the right to sit in judgment upon the vested rights secured by such legislation.

In *Steamship Company* v. *Joliffe*, 2 Wal. 457, on the effect of the repeal of a statute under which rights are vested, Mr. Justice Field, speaking for the Court, has this to say:

> "There are many cases," says Mr. Justice Curtis, speaking for this court, "in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The laws of commercial states and countries have made an offer of pilotage services one of those cases.
>
> "The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as a quasi contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

That the right to the land vested in James F. Rowell under the act of June 17, 1910, is clear, that the act of Dec. 19, 1910, was in effect a legislative decree, wanting in authority under the Constitution is also clear, and that it violates the Fifth amendment is equally clear.

IV.

Review of Authorities and Statutes Cited by the Plaintiff in the Court Below.

Section 6 of Act of Congress May 8, 1906, 34 Stat., p. 182, is cited. The section is as follows:

> "Sec. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotment shall have been made and who has received a patent in fee simple under

the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided, further, That until the issuing of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States. And, provided further, That the provisions of this act shall not extend to any Indians in the Indian Territory.

"That hereafter when an allotment of land is made to any Indian, and such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final."

It requires a very vivid stretch of the imagination to dis-

cover anything in this section affecting this controversy.

The section fixes the status of the members of the Indian Tribes after the expiration of the trust period and to whom trust patents shall be issued, making such Indian, after the expiration of the trust period, subject to the laws, both civil and criminal of the state or territory in which they may reside, and declaring the Indians citizens of the United States. Under certain other circumstances authorizing the Secretary of the Interior in his discretion to remove restrictions as to sale, incumbrance, taxation, etc., of such lands, but exempting the same from the payment of any debt contracted prior to the issuance of fee simple patent; providing that all allottees until the issuance of such patent shall be subject to the exclusive jurisdiction of the United States and excluding from the provisions of the act, the Indians in the Indian Territory. Also provides for the Secretary of Interior to ascertain the legal heirs of any allottee.

In the case at bar no allotment was ever selected; no trust patent issued under the act of April 4, 1910. The Congress acted on its own volition and directed the issuance of a fee simple patent in lieu of an allotment or a money settlement in lieu of an allotment. After the passage of the act of April 4, 1910, defendant Rowell was entitled to an allotment but no trust patent was ever issued and no allotment selected.

Counsel cited and relied upon *United States* v. *Rickert, 188 U. S., 432.*

This case holds that lands during the trust period are not subject to state or local taxation, giving effect to the act of Congress exempting lands from taxation during the trust period.

In the case at bar the lands never became an allotment; the Secretary of the Interior was directed to issue a patent in fee simple in lieu of an allotment. As to this land and this defendant there was no trust period. The direction to issue a fee simple patent conveys the land to the grantee without any limitation or restriction whatsoever.

Plaintiff cited *United States* v. *Gardner, 189 Fed. 690.* Defendant Gardner, a mixed blood Indian, living within the limits of the Stockbridge and Munsey Indian Reservation in Wisconsin, enrolled as an Indian of that tribe, was indicted for rape committed within the limits of the reservation De-

cember 16, 1909, on the person of an Indian girl. Defendant filed a plea in abatement to the jurisdiction of the Federal Court. The court held that so long as an Indian remains within the limits of the Indian Reservation he is subject to the control of the Federal Government and that under the act of Congress, June 21, 1906, the Federal court had jurisdiction over the person of the defendant and the offense charged.

It needs no argument to show that this case decides no principle adverse to the claim of the defendants in the case at bar.

Plaintiff cites the case of *Bagnell* v. *Broderick, 13 Pet. 436,* as an authority holding that the title to public lands does not pass except upon patent.

The case was an action of ejectment, a contest between two persons claiming certain lands in Missouri under New Madrid claims. The plaintiff in the action had obtained a certificate of survey and a patent had been issued thereon. As appears from the case, the prerequisite steps to the issuance of the patent had been complied with. The defendants relied upon a deed from a previous occupant. The Court held by Justice Catron, that in an ejectment suit in a case of that kind, the patent was the best evidence of the legal title. In the opinion at page 450, Mr. Justice Catron uses this language:

> "If Byrnes' devises can show him to have been the true owner of the 750 arpens of land, relinquished because injured by an earthquake and that patent issued to John Robertson, Jr., by mistake; then the equity side of the Circuit Court is the proper forum and a bill the proper remedy to investigate the equity of the parties." This case certainly does not militate against the position of the defendants in the case at bar.

The plaintiff cites *Michigan Lbr. Co.* v. *Rust, 168 U. S., 589,* which was an action of ejectment. At page 590 the case is stated as follows:

> "The contention of the plaintiff generally speaking, is that this was swamp land, and granted to the State of Michigan by the act of Congress of date September 28, 1850, c. 84, 9 Stat. 519, granting swamp land to the several states; that it was included in a list of such lands in the Ionia land district, approved by the Secretary of the Interior and forwarded to the governor of Michigan

on January 13, 1854; that the act of March 3, 1857, c. 117, 11 Stat. 251, confirmed the action of the Secretary of the Interior, and thereby passed the title to the State of Michigan, by which state it was, on October 14, 1887, conveyed to plaintiff's grantor.

"The defendants, on the other hand, contend that the original surveys of the public lands in the State of Michigan were erroneous; that, at the instance of the state, Congress ordered resurveys, which resurveys were carried on from the years 1842 to 1857; that, while it is true this land was by the original surveys classed as swamp land and included in the Ionia land district list approved and certified to the State of Michigan, the resurveys showed that it was not land of that description; that a new list for that district, not including this land, was in 1866 made out and certified to the state; that such new list was accepted by the state as correct, and a patent for the lands described therein issued to and received by it; that after all this had taken place and in 1870 the land in question was sold by the officers of the United States at auction after public advertisement and that patents were duly issued upon such sale, under which patents the defendants claim title."

Mr. Justice Brewer who delivered the opinion of the court, held that the act of 1850, the swamp land act was a *grant in praesenti,* citing on that point *Wright* v. *Roseberry, supra.*

In this case it appears and is admitted that the original survey was erroneus. The survey was made before the swamp land act was enacted.

At the request of the state, Congress ordered a resurvey. Under the resurvey the lands in controversy were not included.

In 1866 the state acepted the resurvey as correct and received a patent in accordance therewith, which did not include the lands in controversy.

In 1870 the United States sold the land in controversy and patents were issued upon such sale.

Twenty-one years after the acceptance of the grant as evidenced by the patent and seventeen years after the United States had sold and conveyed the lands in controversy, on the

14th day of October 1887, the state issued a patent for the lands.

At page 591 Mr. Justice Brewer makes this statement:

"There is no testimony showing what was in fact the condition of the land, whether swamp or not, at the time of the passage of the act of 1850, and the case turns wholly on the documentary evidence.

"The act of 1850 made a grant *in praesenti;* in other words, the title then pased to all lands which at that date were swamp lands, and the only matters thereafter to be considered were those of identification."

Citing:

Railroad Company v. *Smith,* 9 Wall. 95;
French v. *Fyan,* 93 U. S. 169;
Martin v. *Marks,* 97 U. S. 345;
Rice v. *Sioux City & St. Paul Ry. Co.,* 110 U. S. 695.
Wright v. *Roseberry,* 121 U. S. 488;
Tubb v. *Wilhoit,* 138 U. S. 134;

and then proceeds to say: "But while the act operated as a grant *in praesenti* the determination of what lands were swamp lands was entrusted to the Secretary of the Interior."

In the case at bar the land was identified. The right of the defendant Rowell to the lands was fixed by the act and declared to be a fee simple title. There was no question of surveys, no question of identification. The grant was made in lieu of an allotment or money settlement. There was no judicial or quasi judicial power vested in the Land Department.

Again in the opinion at page 592 it is said:

"Generally speaking, while the legal title remains in the United States, the grant is in process of administra tion and the land is subject to the jurisdiction of the land department of the Government. *It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee.*"

Citing with approval the following cases:

Strother v. *Lucas,* 12 Pet. 410;
Grignon's Lesee v. *Astor,* 2 How. 319;
Chouteau v. *Echardt,* 2 How. 344, 372;
Glasgow v. *Hortiz,* 1 Black, 595;
Langdeau v. *Hanes,* 21 Wall. 521;

Ryan v. *Carter*, 93 U. S. 78.

However, the plaintiff relies upon this statement in the opinion of Justice Brewer at page 593:

> "But wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the Government until the issue of the patent, *Bagnell* v. *Broderick*, 13 Pet. 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost."

This declaration of the learned Justice taken in connection with the great number of cases decided by this court is not entirely accurate and among these cases decided by the learned Justice himself, notably, statement in the opinion written by him in *Shaw* v. *Kellog*, 170 U. S. 312, and wherein the opinion at page 341, the learned Justice says:

> "There is no magic in the word 'patent,' or in the instrument which the word defines. By it the legal title passes, and when by whatsoever instrument and in whatsoever manner that is accomplished, the same result follows as though a formal patent were issued. *Rutherford* v. *Greene*, 2 Wheat, 196, 206; *Bryan* v. *Forsyth*, 19 How. 334; *Langdeau* v. *Hanes*, 21 Wall. 521, 531."

The rule according to the decisions of this court is that where there is a legislative grant—as in the case at bar—*in praesenti*, and the property is identified and nothing left to the Land Department to determine, and there is a provision directing the issuance of a patent, the patent is held to be the mere proper and convenient evidence of the title actually transfered by the law itself.

In the opinion again the learned Justice says:

> "It is, of course, not pretended that where an equitable title has passed, the Land Department has the power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title and upon hearing, to determine the question whether or not such title has passed."

This declaration of the learned Justice applies only to cases in which the Land Department is vested with some discretion and where the determination of some matter within the jurisdiction of the Land Department is vested in the Land Department; but in the case at bar there was nothing for the

Secretary of the Interior to do except to obey the direction of the Congress and issue the patent. He had nothing to determine. No question is submitted to him to be determined.

We are not however, quite able to harmonize the language used in this decision with the decisions of this court and other courts on a proper construction of the swamp land act of 1850.

All the cases agree that the swamp land act is a grant *in praesenti* and passed the legal title to all lands in the several states that were in fact swamp lands, and numerous cases have held that the patent was not necessary to pass the title.

However, warrant for holding that the patent is necessary is found in the act itself in the following words contained in Section 2:

> "And on that patent the fee simple to the land shall vest in the State of Arkansas, subject to the disposal of the legislature thereof."

This court in *Wright* v. *Roseberry, supra;*
The Supreme Court of Iowa;
C. R. I. & P. Ry. Co. v. *Brown,* 40 Iowa, 333;
The Supreme Court of Arkansas;
Fletcher v. *Pool,* 20 Ark., 100;
Branch v. *Mitchell,* 24 Ark. 431, 444;
Ringo's Executors v. *Rotan's Heirs,* 29 Ark. 56;
The Supreme Court of California;
Kernan v. *Griffith,* 27 Calif. 87;
The Supreme Court of Illinois,
Keller v. *Brickley,* 78 Ill. 133;
The Supreme Court of Missouri;
Clarkson v. *Buchannan,* 63 Mo. 563;
Campbell v. *Wortman,* 58 Mo. 258;
The Supreme Court of Oregon;
Gaston v. *Stopp,* 5 Ore. 48,

all hold that the issuance of a patent is not necessary to vest the title in the state; that the act of Congress being a grant *in praesenti,* carried the title to the state and that the patent merely operates as a further assurance of the title.

The plaintiff in the court below also cited the case of *Carter* v. *Ruddy, 166 U. S., 493,* in which case in the syllabus the following declaration is made:

> "Generally a patent is necessary for transfer of the legal title to public lands.

"It is well settled that an action of ejectment cannot be maintained in the courts of the United States on a merely equitable title; and there is nothing in this case to exempt it from the rule that a patent is necessary to convey legal title."

In this case plaintiff's claim by virtue of a location of Sioux half-breed scrip; that certificate No. 430, Letter C, for 80 acres was issued to Walter Bourke, who afterwards assigned it to W. R. Wallace and in 1883 Wallace located under this scrip upon 80 acres. When the papers were transmitted to the General Land Office at Washington it was discovered that Walter Bourke had applied to the department for duplicate certificate upon the representation that the original had been lost or destroyed; that such application had been sustained and duplicate certificate issued; that on March 9, 1880, he had located such duplicate certificate on land in Dakota and received a patent. Upon the disclosure of these facts the Commissioners of the General Land Office cancelled the location in Idaho which was upheld by the Supreme Court.

This was a case within the jurisdiction of the land department. In the opinion, however, at page 495 *et seq.*, Justice Brewer, after stating that in general the certificates of the land office do not convey the legal title of the land to the holders of the certificates and announcing the rule always conceded that ejectment cannot be maintained upon an equitable title, says:

"It is true there are exceptions to this rule. One is specially provided by statute, Rev. Stat., Sec. 2449, which makes a certification to a state equivalent to a patent as a conveyance of title. Again, as said in *Wilcox* v. *Jackson*, (*supra*), 'one class of cases to be excepted is, where an act of Congress grants land, as is sometimes done in words of present grant.' This exception was recognized in *Wisconsin Central Railroad* v. *Price County*, 133 U. S., 496; *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S., 1; *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241."

Again the power of the Commissioner of the General Land Office to cancel an erroneous certificate of location issued by the local Land Office is discussed and is upheld.

In the case at bar, there is no discretion left in the Sec-

retary of Interior, nothing for him to decide; he is directed to issue the patent.

Plaintiff further cites the case of *Bryan* v. *Forsyth, 19 How., 334.*

A miscroscope applied to the facts in the case at bar fails to discolse any reason for citing this case. It involves certain acts of Congress, May 1820, and March 1823, by which provision was made that each of the settlers of Peoria, Illinois, should be entitled to select a lot and the surveyor of public lands was directed to designate upon the plat the lot confirmed to each claimant. The second syllabus makes this declaration of the law:

> "The act of 1823 conferred on the grantee an incipient title; and when the survey was made and approved, by which the limits of the lot were designated, the title then became capable of sustaining an action of ejectment, even before a patent was issued."

In the case at bar there was no survey to be made; there was no trust patent to be issued; no certificate to be issued; nothing was to be done by the land department except to issue the patent.

Plaintiff also cites *Hy-Yu-Tse-Mil-Kin* v. *Smith, 194 U. S., 401.* This case does not affect the case at bar. It is only an authority that during the process of allotment the Interior Department may exercise its discretion in making allotments. real point decided, however, is to the effect that in a contest between two Indians each claiming the same land, the United States has no interest in the result and is not a necessary party. Of course, the Indians as wards of the government are under the jurisdiction of the Interior Department, in which the Interior department is always and at all times, subject to the control of Congress.

Plaintiff also cites the case of *Starr* v. *Long Jim, 227 U. S., 613.*

In this case the plaintiff in error as plaintiff, brought suit in the Superior Court of the State of Washington to quiet his title to certain lands conveyed to him by deed in 1900 by the defendant Long Jim. Under treaty with Chief Moses and other Indians of the Columbia and Colville Reservation in the State of Washington, an agreement was entered into by which the government of the United States agreed to allot to the Indians certain lands in the State of Washington. Long Jim

by the decisions of the Interior Department was entitled to the benefits of the agreement. The Interior Department construed this agreement to be of the effect that the United States should and would hold the title to the lands in trust for ten years, and thereafter patents were to be issued in fee to the Indians.

In 1900 he made a *deed* to the plaintiff conveying his allotment.

On March 3, 1905, (35 Stat. 1048-1064-1065), Congress authorized the issuance of a patent in fee to Long Jim as follows:

> "That the Secretary of the Interior be, and hereby is, authorized and directed to issue a patent in fee to Long Jim for the lands heretofore alloted to him by the Secretary of the Interior on April eleventh, eighteen hundred ninety-four, * * * * to-wit: (Description of land), free of all restrictions as to sale, incumbrance or taxation."

The plaintiff Starr sought to quiet his title against Long Jim under the warranty contained in his deed of 1900, and the Court held that the deed was void because the title under the terms of the act remained in the United States and alienation by allottee inhibited, and Long Jim being *non sui juris* could not make a valid conveyance, that he was not estopped by his warranty to claim that the deed was void.

Long Jim had received an allotment and trust patent; there is no suggestion in the case that the issuance of the patent to Long Jim after the passage of the act of March 3, 1905, was necessary to vest the title in him or that after the passage of the act he could not have made conveyance of his title.

In the case at bar no allotment had been made and the grant was in lieu of an allotment or a money settlement in lieu of an allotment of land. It is difficult to see how the Long Jim case can possibly be tortured into supporting the claim of the plaintiff.

Plaintiff also cites *Monson* v. *Simonson, 231 U. S., 341.* This case was a suit to determine conflicting claims to the title of 160 acres of land in Roberts County, South Dakota. Both parties claimed through Henry A. Quinn, an Indian of the Sisseton and Wahpeton tribe, to whom the land was alloted under act of Congress, February 8, 1887, (24 Stat. 398).

In 1889, following the approval of the allotment, a trust patent or allotment certificate was duly issued to the allottee. On March 3, 1905, nine years before the expiration of the trust period, Congress incorporated in the Indian appropriation act of that date, (33 Stat. 1048-1067), the following provision:

> "That the Secretary of the Interior is hereby authorized and *empowered* to issue a patent to Henry A. Quinn for the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section thirty-two, township one hundred and twenty-five north, range fifty west of the fifth principal meridian, South Dakota."

The land described in the act was covered by the allotment and patent was duly issued passing the full, unrestricted title to the allottee by the Secretary of the Interior, June 29, 1905. The plaintiff claimed under two warranty deeds from the allottee, one made and acknowledged May 31, 1905, and recorded June 2, following; the other purporting to have been made May 30, and acknowledged July 3, 1905, but not recorded. The defendant claimed under deed from allottee executed and delivered July 10, 1905, and recorded the same date.

In discussing the effect of the act of March 3, 1905, above quoted, Mr. Justice Vandeventer, at page 346, says:

> "It also is plain that, in the absence of further and permissive legislation, the Secretary of the Interior was without authority to shorten the trust period and at once invest the allottee with title in fee. Recognizing that this was so, and for reasons deemed sufficient, Congress, by the provision in the act of March 3, 1905, clothed the secretary with such authority with respect to this allotment. That provision says: 'The Secretary of the Interior is hereby authorized and empowered to issue a patent' to the allottee. By 'patent' is meant, of course, the ultimate patent passing the fee, for the trust patent or allotment certificate had issued sixteen years before. *The language of the provision is permissive, not mandatory, and evidently was designed to enable the Secretary to shorten the trust period, by issuing the final patent, if in his judgment it semed wise, but not to require him to do so.* And it is significant that the provision contains no words directly or presently removing the existing re-

strictions upon alienation, while other kindred provisions in the same act, relating to other allotments, contain the words 'and all restrictions as to sale, incumbrance, or taxation of said lands are hereby removed.' It hardly can be said that the absence of those words in this instance and their presence in others is not indicative of a difference in meaning and purpose. We conclude that the restrictions upon alienation contained in the act of 1887 were not instantly removed by the act of 1905, but remained in force as to this allotment until the Secretary of the Interior, in the exercise of the authority conferred by the latter act, terminated the trust period by issuing the final patent passing the fee."

It would seem that the reasoning of Justice Vandeventer in this case is decisive of the question in the case at bar in favor of the defendants. And again we suggest that no trust patent was ever issued under the Kiowa-Comanche-Apache agreement to the defendant Rowell after the passage of the act of April 4, 1910, and so far as the defendant is concerned, no trust under that agreement to the specific lands, was ever created between defendant Rowell and the United States. The act is a specific grant to Rowell. The language of the act of June 17, 1910, is mandatory; it does not vest in the Secretary of the Interior any discretion to determine the question as to whether Rowell was competent or entitled to receive the fee simple patent, or any question in an administrative capacity. After the passage of that act he had no power or authority to make an allotment to Mr. Rowell. He could not have said to Mr. Rowell, "I do not think you are entitled to this land that Congress has directed me to convey to you; I will make you a conveyance of another tract of land."

The fee simple patent to any other tract of land under the Kiowa-Comanche-Apache agreement would have been absolutely void because not authorized. There can be no question but what the act of June 5, 1905, did merely vest in the Secretary of the Interior as to allottee Henry A. Quinn, the discretion to shorten the trust period and to issue to him a fee simple patent. That act charged the Secretary of the Interior with the duty to determine whether the Indian was capable of transacting his own business and of receiving safely, the fee simple patent to his allotment theretofore made.

In the case at bar the Congress has determined these

questions for itself, and taken their determination away from the Secretary of the Interior, and directed him to issue a fee simple patent in lieu of an allotment, no allotment having been made.

The plaintiff cites *Veale* v. *Maynes,* from the Supreme Court of Kansas, *23 Kansas, page 1.* The case is stated as follows:

> "Action in the nature of ejectment, brought by Susan Maynes against George Veale and twenty-five others, to recover possession of a certain tract of land which she claimed by virtue of an allotment to her under the Pottawatomie treaty of 1861. The defendants below, plaintiffs in error here, claimed under the patentee, Anthony F. Navare, who, as the head of the family of which the plaintiff below, defendant in error here, was a member, received the patent for the land in controversy, as provided for by section six of the treaty of 1867."

The plaintiff claims as an allottee; the defendants claim under patent issued to the head of the family under Article 3 of the treaty. In the opinion at page 18, Mr. Justice Brewer discussed the question as follows:

> "The very manner of thus dealing shows that the parties thereto did not understand that the treaty of 1861 placed the allotted lands, any more than the allottees themselves, outside the limits of tribal control. If the legal title, or even a full equitable title, was vested by the allotment in the allottee, then, by our laws at least, no divesting of that title save by the personal assent of the allottee was possible; and any contract therefor would have to be made with each allottee personally."

The patent under which the defendants claimed was made under express authority of the act of Congress approving the agreement and was therefore the better title. The case as stated by the learned Justice does not in any way conflict with the rulings of the court below in this case or in any way militate against the rights of these defendants.

The plaintiff also cites *Smythe* v. *Henry et al., 41 Fed. 705.* It is hardly necessary to review the facts of this case. The case arises under an act of the legislature of North Carolina donating to Chief Junaluska of the Cherokee Indians, certain lands for services rendered in the interest of his tribe and the promotion of peace between the Indians and white

settlers. In the opinion at page 706, the Circuit Court in discussing the law makes this declaration which expressly recognizes and asserts the principle contended for by defendants in this case.

"This was clearly a donation act, and from its passage vested in Junaluska a title to the land specifically described, and directed to be conveyed by a grant to be executed by the secretary of the state. The grant was duly executed on the day of the passage of the donation act. The execution of the grant was a mere ministerial act of the officer charged with the duty to be performed as directed by the legislature. The grant was additional and convenient evidence of the title to the land previously conveyed by the donation act, and related back to the inception of the rights of the grantee, and could not change the title as originally conferred. A legislative grant that proceeds more immediately from the source of title is entitled to greater weight and dignity than a grant executed by a ministerial officer acting under the provisions of the statute. *Morrow* v. *Whitney*, 95 U. S., 551; *Barney* v. *Dolph*, 97 U. S., 652; *Whitney* v. *Morrow*, 112 U. S., 693, 5 Sup. Ct. Rep. 333."

Plaintiff also cites *Briggs* v. *Wash-puk-qua et al., 37 Fed. 135.*

It is difficult to see upon what theory plaintiff cites this case as an authority against the rights of the defendants in the case at bar. The syllabus of the case is as follows:

"Act Cong. Aug. 4, 1886, Sec. 2 (24 Stat. at Large, 219) provides that on the death of an allottee of land under the treaty of June 28, 1862, with the Kickapoo Indians, leaving heirs, and without having obtained patents, the Secretary of the Interior shall cause patents in fee simple to issue in the name of the original allottee, and that such original alottee shall be regarded as a citizen of the United States and of the state of Kansas; the land to become a part of his estate; to be administered or descend to his heirs, etc. *Held*, that the United States holds the legal title in fee simple in trust for the heirs of the allottee, and the latter are estopped by their warranty deed conveying the land before obtaining a patent from asserting title against the grantee."

The case holds that under the treaty with the Kickapoo Indians of June 28, 1862, where lands are held in trust, on the death of an allottee the land descends to the heirs and that immediately upon the death of the allottee, the title vests in the heirs, and that the title having vested in the heirs, the conveyance by them before the issuance of the patent provided by the treaty, is valid.

In the opinion at page 136 *et seq.*, the court has this to say:

> "The right to the patent was absolute and complete, and the duty of the Secretary of the Interior to issue the patent was imperative. Mr. Justice Field, in *Stark* v. *Starrs*, 6 Wall. 418, says:
>
> " 'The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants.'
>
> "If the patent relates back to the inception of the right to it to cut off intervening claimants, with equal reason and justice it must relate back to estop the patentee from asserting title against his grantee under warranty deed made before the patent actually issued, and after his right to it had become absolute. In *Langdeau* v. *Hanes*, 21 Wall. 530, the court uses the following language:
>
> " 'A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectively as a grant or quitclaim from the government. * * * If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title.' "

To the same effect is the case of *Briggs et al.* v. *McClain*, from the Supreme Court of Kansas, 23 Pac. 1045, cited by plaintiff and in the opinion at page 1046, the court says:

> "Under this act of Congress the right to a patent became complete in the allottee. Nohing more remained to be done but the ministerial duty of the proper officer of the government to issue a patent, and by this act this duty was made imperative.

"Mr. Justice Field, in the case of *Stark* v. *Starrs*, 6 Wall. 418, says: 'The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants.' We think, under this treaty and the act of Congress of 1886, the title to the land in controversy was fixed in the heirs of Ke-o-tick, the deceased allottee, whoever they may be. In the case of *Langdeau* v. *Hanes*, 21 Wall. 530, the court says: 'A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quitclaim from the government. * * * If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title.' This same doctrine was enunciated in the case of *Oliver* v. *Forbes*, 17 Kan. 124; and this treaty, and the act of Congress under consideration, have received the construction which we have adopted in the case of *Briggs* v. *Wash-puk-qua*, 37 Fed. Rep. 135, by the United States Circuit Court for the district of Kansas. The court below erred in sustaining the demurrer to the plaintiffs' petition, and we therefore recommend that the judgment be reversed."

Edde v. *Pash-pah-o et al.*, from the Court of Appeals of Kansas, *48 Pac. 884*, cited by plaintiff, is to the same effect, and the court decided in this case that the laws of descent and distribution of the State of Kansas determined the quesion of heirship as provided in the act of Congress.

It is useless to review the case of *Campbell* v. *Paramore*, Supreme Court of Kansas, 17 Kan. 639, cited by plaintiff, as it in no way affects the question here under discussion. It does, however, decide that where, under the Ottawa treaty, an Indian becomes of age that he is entitled to a fee simple patent to his land and then had the power to sell.

We have not been favored with any brief by the Attorney General in this court, and therefore have dealt with the authorities cited in the court below. The cases cited by coun-

sel for the plaintiff are decisive of the questions here involved in favor of these defendants.

There is no question under all the authorities but what when the Congress directs the secretary to make a fee simple patent, it vests the secretary with no discretion and his acts are purely ministerial. The title vests irrespective of the patent, and as stated time and again, the patent becomes merely the convenient evidence of the title, and be the title by the act either equitable or legal, the legislative body can no more destroy by its edict the one than it may the other.

V.

CONCLUSION.

From the record, and the questions involved, it would seem unnecessary to burden this court with the consideration of a brief of such length.

The plaintiff, however, seems to take itself seriously, sufficiently so, at least, that it has appealed to this court, thereby inviting the defendants to defend their title, and submit their cause, which we have tried to do to the best of our ability. Believing all the time that the case presents within a narrow scope simple questions, long since ably considered, and judicially determined by this court, and every other court to which the questions involved have been presented.

The power of Congress to pass the act of April 4, 1910 is conceded.

The power of Congress to pass the act of June 17, 1910, is conceded.

No one can read the act of June 17, 1910 and fail to discover the intention of the Congress to give the land in controversy to James F. Rowell.

Construed in the light of the decisions of this court, it was present grant to James F. Rowell of the land.

The act being of itself a grant of the land, the direction of the Congress to the Secretary of the Interior to issue the patent, such patent, when issued, is merely the convenient evidence of the title already grantd by the act.

No discretion was vested in the Secretary of the Interior; no administrative question was left for his determination.

His duties under the act are purely ministerial and he could not by failing or refusing to issue the patent deprive the defendant of his title granted by the act.

While in some cases in the administration of the department of the interior, the secretary might be vested with some judicial or *quasi* judicial power, there is no such power vested in him by the act. In fact, all judicial or *quasi* judicial questions are emphatically taken from the secretary by the terms of the act itself.

The Congress of the United States is not vested under the constitution and laws of the United States with any judicial power. The title having vested in James F. Rowell, whether legal or equitable, it was beyond the power of Congress by a legislative decree repealing the act, to deprive him of his property.

The act of December 19, 1910 was therefore in direct violation of the provisions of the Fifth Amendment of the Constitution of the United States.

We therefore, respectfully submit that the judgment of the trial court is right and should stand.

HENRY E. ASP,
HENRY G. SNYDER,
FREDERICK B. OWEN and
WALTER A. LYBRAND,
Attorneys for Defendants in Error.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

The United States of America,
Plaintiff in Error,

vs.

James F. Rowell, Maud Rowell, and Georgae Hamon,
Defendants in Error.

No. 63.

DEFENDANTS IN ERROR'S ANSWER BRIEF AND ARGUMENT.

I.

The plaintiff in error having filed its brief in this cause after it had been placed on call on the docket, this Court very kindly granted to the defendants in error the privilege of filing an answer brief.

The defendents in error filed some weeks ago, their brief in this cause with a very complete statement of the case and the record, (defendants in error's brief, pages 1 to 17 inclusive), and reviewing under the fourth heading of their brief, at pages 81 to 98 inclusive, all of the cases cited by the plaintiff in the court below.

Plaintiff in error in its brief in this Court has raised some questions not urged in the court below and has included in its statement of its case, matters not found in the record. Notably, at pages 7 and 8 of plaintiff in error's brief, a map

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lution of a sub-committee of the house committee on Indian affairs. This resolution was not offered in evidence in the court below and would have been inadmissible if offered, because such commitee nor any commitee of the Congress nor the Congress itself would have any right to try the question of individual rights of property. (Defendants in error's brief, pages 69 to 81 inclusive).

The first subdivision of plaintiff in error's brief is denominated "ARGUMENT."

Under this heading it is urged that the act of December 19, 1910, was deliberately enacted by Congress to repeal the previous act of June 17, 1910, which earlier act a committee of the House of Representatives found to have been secured by Rowell by misrepresentation and deception.

On this phase of the case he urges that the decisions that the courts will declare acts of Congress unconstitutional only when no other construction is possible, are peculiarly applicable to this case, and he insists that there are no equities in this case on behalf of the defendants.

It is admitted that defendant Rowell lived among these Indians since 1899, and that during that time he had practiced his profession among the Indians without compensation; that he had married an Indian woman and had four children by such Indian woman, and that prior to June, 1909, was regularly adopted into the Kiowa tribe of Indians as an intermarried citizen.

It can scarcely be urged that these circumstances do not raise in Mr. Rowell's favor, any equities.

The cases cited by plaintiff in error do not bear out its contention, and are not applicable to this case because there is nothing ambiguous in the acts.

Plaintiff in error cites in support of its declaration that an act of Congress should not be held unconstitutional, except in the clearest case. *Parsons* v. *Bedford*, 3 Pet. 433, 448, 449.

This case presents a question of practice arising in the state of Louisiana.

It appears that the act of Congress of May 6, 1824, directs that the practice in the courts of the United States in the state of Louisiana shall be according to the rules of practice in the state courts.

Under the state practice the court was required on request, to direct the clerk of the court to take down in writing the testimony of the several witnesses examined by the respective parties in order that the same might appear of record, and, such being the practice in the several courts of the state, it was urged that such should be the practice in the federal courts.

The court held that such a provision would be in violation of the seventh amendment to the Constitution, and, therefore, in that respect, the practice in the state court did not apply to the United States courts in Louisiana—a well reasoned and very appropriate ruling. We cannot see any principle upon which this case would be even persuasive in the case at bar.

In the case of *Hooper* v. *California*, 155 U. S. 648, cited by plaintiff in error, the defendant was prosecuted under the penal code of California for procuring insurance on account of foreign companies that had not complied with the laws of the state in that "the defendant then and there procured for a resident of this state, insurance from an insurance company not incorporated under the laws of this state, to-wit, China Mutual Insurance Company of Boston, said company or its agents not then or there having filed the bond required by the laws of this state relative to insurance."

The defendant had procured for a resident of the state of California a policy of marine insurance on an ocean steamer from a foreign insurance company which had not complied with the laws of California.

The Court held—the present Chief Justice writing the opinion—that, "the right of a foreign corporation to engage in business within a state other than that of its creation, depends solely upon the will of such other state," and citing a

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No one at this day doubts the correctness of this proposition.

It was urged that the transaction involved the Commerce Clause of the Constitution, and, in the opinion at page 655, the Court say:

> "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.' "

It is difficult to see how this case has any application to the case at bar.

The next case cited is *United States* v. *Jin Fuey Moy*, 241 U. S. 394-401. The case is an indictment for conspiracy to have in possession opium. The writer has not the case now before him. The indictment was quashed on the ground that it did not bring the defendant within the act. The court below held the act to be a revenue measure and not a police regulation and being a revenue measure, not unconstitutional. The Court, however, did make the statement that where an act of Congress is susceptible of two constructions, one of which would make the act unconstitutional, and the other reasonably within the terms of the act, would make the act constitutional, the Court will give to the act that construction which will uphold its validity. The case was one in which that principle could reasonably be applied.

The case of *Granada County Supervisors v. Brogden*, 112 U. S. 261, 268, 269, is also cited, which involved the validity of an issue of county bonds, the question being whether the act authorizing the county to issue bonds was invalid because it authorized such issue upon a vote of a majority of the electors. The Court held an issue of bonds valid voted under the act where it appeared that the vote itself was in accordance with the provisions of the state constitution requiring the assent of two-thirds of the electors voting.

U. S. 531, 546, the question was as to the valadity of a police regulation requiring operators of coal mines to leave pillars in the mines for the support of the roof. The Court held it was a reasonable police regulation, and, being a police regulation, the requirement of the inspector of mines was upheld as not denying due process of law.

This case is in harmony with the other decisions of the courts and was a proper case for the application of the doctrine contended for.

Also the case of *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 545, is cited. This case is cited in support of the statement, "Any doubts as to the intention of the government in an act granting land are to be resolved in its favor."

The case was one of supposed conflicting grants of franchises, and the court announced the very familiar doctrine that a grant of a franchise to one person or corporation to perform a *quasi* public function, in the absence of limitations, is not an exclusive grant and does not prevent the granting of like privileges to another person or corporation to perform the same *quasi* public duty.

Anyone familiar with the decisions of the courts would not for a moment deny the correctness of this statement of the law, but its application to the case at bar is seriously questioned.

In the case of *Dubuque & Pacific R. R. Co.* v. *Litchfield*, 23 How. 66, 88, cited by plaintiff in error, the act of Congress, August 8, 1846, made a grant of land to Iowa Territory to improve navigation of the Des Moines river from its mouth to Raccoon Fork.

By act of May 15, 1856, Congress made a grant of land to the state to aid in the construction of a railroad from Dubuque to a point on the Missouri river near Sioux City. The land was claimed under the two acts and the court held that the title under the first act of 1846 must prevail if the grant extended above Raccoon Fork, but held that by the limitations of the act the first grant did not extend above Raccoon

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Fork and therefore, did not conflict with the grant under the act of 1856.

In the case of *Rice* v. *Railroad Co.*, 1 Black 358, 379, 380, cited by plaintiff, the first syllabus states the law as follows:

> "If Congress pass an act granting public lands to a territory to aid in making a railroad, and if, by the true construction of the act, the territory acquired any beneficial interest in the lands as contradistinguished from a mere naked trust or power to dispose of them for certain specified uses and purposes, the act is irrepealable, and a subsequent act attempting to repeal it is void."

However, in this case the limitations upon the grant was expressly stated in the act and the court in its decision enforced the provisions.

There is no possible relation between the case and the case at bar.

In *Wisconsin Central Railroad Co.* v. *Forsythe*, 159 U. S. 46, 55, the syllabus correctly interprets the case:

> "The land in controversy in this case is within the place limits of the road of the plaintiff in error, and was subject to the full control of Congress at the time of the grant made by section 3 of the act of May 5, 1854, c. 80, 13 State. 66, and it passed by operation of that grant, notwithstanding the fact that it was withdrawn by the Land Department in 1856 and 1859, in order to satisfy the grant made by the act of June 3, 1856, c. 43, 11 Stat. 20."
>
> "Every act of Congress making a grant of public land is to be treated both as a law and a grant, and the intent of Congress, when ascertained, is to control in the interpretation of the law."
>
> "When Congress makes a grant of a specific number of sections of public land in aid of any work of internal improvement, it must be assumed that it intends the beneficiary to receive such amount of land; and when it prescribes that those lands shall be alternate sections along the line of the improvement, it is equally clear that the intent is that, if possible, the beneficiary shall receive those particular sections."
>
> "The courts are not concluded by a decision of the Land Department on a question of law."

We have also examined the case of the *M., K. & T. Railroad Company* v. *Kansas & Pacific Railroad Company*, 97 U. S. 491, 497.

In the opinion at page 497 is this statement of the law:

"It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will."

The case of *Frisbie* v. *Whitney*, 9. Wall. 187, 192, was a case of a pre-emption claimant. The case holds that a pre-emption settler on the public lands obtains only an inchoate right and that the power of Congress over the lands as conferred by the Constitution, can only be restrained by the court in cases where the land has ceased to be government property by reason of a right vested in some person or corporation, and in such cases a vested right under the pre-emption law is only obtained when the purchase money has been paid and a receipt of the proper land officer has been given to the purchaser.

So far as we are advised, there are no cases to the contrary.

There is, however, in the case of *Delassus* v. *United States*, 9 Pet. 117, a statement by Chief Justice Marshall, at page 133, given under different conditions, as follows:

"The right of property then is protected and secured by the treaty; and no principle is better settled in this country, than that an inchoate title to lands is property."

The decision cited recognizes that when the pre-emptor

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obtained is equivalent to a patent actually issued and that as soon as payment has been made by a pre-emption claimant he may sell and convey his land even though he has not yet obtained a patent. The decision extends only to the assignment of the pre-emption right.

Myers v. *Croft*, 13 Wall. 291.

There is nothing ambiguous about the several acts of Congress. There is no question of doubtful construction involved in either of the acts. The act of April 4, 1910, directs the Secretary of the Interior to enroll and allot James F. Rowell as a full member of the Kiowa, Comanche and Apache tribe of Indians.

The act of June 17, 1910, directs the Secretary of the Interior to issue a patent in fee for the described tract of land to James F. Rowell, reciting the fact that he has heretofore received no allotment of land or money settlement in lieu of the allotment.

The Secretary of the Interior was not given any discretion or vested with any judicial power.

Counsel for the plaintiff in error seems to think that because the grant was made in lieu of an allotment or money settlement in lieu of an allotment, that there was something for defendant Rowell to do. But the act of Congress contains no requirements.

The testimony discloses that Rowell made application at the offices of the Secretary of the Interior very shortly after the enactment and requested his patent; that he was told that the patent would be issued. (Record, page 51).

Also that he authorized Messrs. Britton & Gray to make request for the patent, which request is found in the record at page 31.

In the case of *United States* v. *Schurz*, 102 U. S. 378, in the opinion at page 399, *et seq.*, Mr. Justice Miller, speaking for the Court, discusses this question as follows:

"It is also said that there was no acceptance of this patent by the grantee, and for that reason it is ineffectual to pass title. It is not necessary to enter into a

discussion on this subject, because the acceptance of a deed may be presumed under circumstances far short of what was admitted to exist in this case.

"The doctrine on this point is well stated by Attorney General Crittenden, in the case of Pierre Mutelle, in 1841, as found in 3 Opp. Att.-Gen. 654, which was a case like the present, in regard to the duty of the Secretary to deliver the patent then lying in the office.

" 'My opinion,' said he, 'is that the title to the land did pass to Pierre Mutelle at the date of the patent to him, though that patent still remains in the land-office without any actual tradition of it to any one. The patent was issued by authority and direction of law, and upon general principles, where the patentee does not expressly dissent, his assent and acceptance are not to be presumed from the beneficial nature of the grant. But it is hardly necessary to resort to such presumptions, because, in this and in all such cases, the acts required to be done by the claimant, and actually done by him in the preparation of his claim for patenting, are equivalent to a positive demand of the patent and amount to an acceptance of it. The patent, in the meaning of the act referred to, is granted to the patentee from its date, though he may never actually see or receive it, and is valid and effectual to pass the title to the land.'

"All legal muniments of title belong to him who owns the land, * * * but as the patent is a recorded evidence of title, always accessible, no material prejudice can result to the true owner from a stranger getting possession of it.

"The long pursuit of this claim by McBride, his repeated demand for the patent after it had been perfected, and his persistent effort to obtain possession of it, *are ample proof of his acceptance of the grant of which it is the evidence.*"

It is respectfully urged that by the act of June 17, 1910, the Congress had done all it could to vest a legal title in the defendant Rowell. And defendant Rowell has done all he could to obtain the evidence of his title.

If there was any title at all vested in Rowell, it was the title expressed in the act, to-wit, a fee simple title. There is

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perfect his right to the described land. There cannot possibly be any question in the mind of any person reading this act as to the intention of Congress.

II.

In heading Number One of plaintiff's brief it is urged that the act of June 17, 1910, did not of itself, vest Rowell with title to the land, and, that therefore, prior to the issuance of patent it was competent for the Congress to pass the repealing act of December 19, 1910, and that until the legal title passed out of the United States by the issuance of the patent, Congress had full power over the property of its Indian ward.

Of course, we insist that the legal title passed under the act; that is a fee simple title, that being the title expressed in the act, unconditional and without limitation.

Counsel cites the case of *Choate* v. *Trapp* 224 U. S. 665, 678, and attempts by process of reasoning, to interpolate in the act of June 17, 1910, a stipulation that before Rowell would be entitled to his patent he must execute some kind of a consent to the government relinquishing his right to the tribal property, or that he must do something to quitclaim to the government or to the tribe, his claim to an allotment or a money settlement in lieu of an allotment.

Nothing of that kind is required by the act, and a request for the patent and the acceptance of the patent would operate as a surrender of any rights to another allotment.

The act itself recites that Rowell has received no allotment of lands or money settlement and, after this direction to the Secretary of the Interior to issue this patent, it would seem that all power and right in the Secretary of the Interior under the act of April 4, 1910, was abrogated.

The only thing the secretary was authorized to do was to put in motion the machinery, which he did. Then, on request, he held up the final execution and delivery of the patent. Is it possible that the Secretary of the Interior by refusing to

issue the patent, could thus deprive Rowell of his rights to this land? Is it possible that the Secretary of the Interior by his failing to act, could overcome and make void a grant by Congress?

In *Choate* v. *Trapp, supra,* the syllabus, in part, states:

"There is a broad distinction between the power to abrogate a statute and to destroy rights acquired under it; and while Congress, under its plenary power over Indian tribes, can amend or repeal an agreement by a later statute, it cannot destroy actually existing individual rights of property acquired under a former statute or agreement.

"The individual Choctaw and Chickasaw Indian had no title or enforcible right in tribal property, but Congress recognized his equitable interest therein in the Curtis Act of June 28, 1898, 30 Stat. 505, and offered to give him, in consideration of his consenting to the distribution an allotment of non-taxable land; and the acceptance of the patent by each member of the tribe was on the consideration of relinquishment of his interest in the unallotted tribal property.

"A patent for an Indian allotment containing an agreement assenting to the plan of distribution, like a deed poll, bound the guarantee, although not signed by him, and the benefits constituted the consideration for the rights waived.

"The tax exemption in the patents for Indian allotments under the Curtis Act was not a mere safeguard against alienation, and did not fall with the removal of restrictions from alienation by the act of May 27, 1908, 35 Stat. 312.

"The removal of restrictions on alienation of Indian allotments falls within the power of Congress to regulate Indian affairs, but the provisions for non-taxation is a property right and not subject to action by Congress.

"The non-taxation provisions as to Indian allotted lands in the Curtis Act gave a property right to the allottees, and was binding on the state of Oklahoma.

"Patents issued in pursuance of statute are to be construed in connection with the statute, and those issued to allottee Indians under the Curtis Act gave the allottees as good a title to the exemption from taxation

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land itself; and the tax exemption constituted property of which the patentees could not, under the Fifth Amendment, be deprived without due process of law.

"An exemption from taxation, of land allotted to Indians in pursuance of an agreement to distribute the tribal property, will not be construed strictly, as a gratuitous exemption to a public service corporation is ordinarily construed, but will be construed liberally under the rule that all contracts with Indians are so construed.

"The tax exemption provisions of the patents to Indian allottees under the Curtis Act attached to the land for the limited period of the exemption.

"Indians are not excepted from the protection guaranteed by the Federal Constitution, but their rights are secured and enforced to the same extent as those of other residents or citizens of the United States."

We cannot give to this case the construction insisted upon by plaintiff in error. It was held that the Congress had the right to remove restrictions against alienation and to lengthen or shorten the term during which the property of an Indian should be inalienable.

The Supreme Court of Oklahoma held that the provisions that the land should be non-taxable was not a contract, but a mere gratuity which could be withdrawn at will, and it will be remembered that the Congress itself in the act removing restrictions against the sale or incumbrances of the land provided, that the lands from which restrictions had been removed, should be subject to taxation.

And at page 674, Mr. Justice Lamar speaking for the court, has this to say:

"It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by statute. But as it is claimed that he, in fact, acquired no valid exemption, since it stands on a different footing from the grant of the land itself; and that, though the provision of non-taxability added to the value of the property, it can be withdrawn because, if not a gratuity, it is at least subject to the general rule that tax exemptions are to be strictly construed and are subject to repeal

And, again, at page 677, the learned Justice says:

"There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. In *re Heff*, 197 U. S. 488, 504; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307; *Smith* v. *Goodell*, 20 Johns. (N. Y.) 188; *Lowry* v. *Weaver*, 4 McLean 82; *Whirlwind* v. *Von der Ahe*, 67 Mo. App. 628; *Taylor* v. *Drew*, 21 Arkansas 485, 487. His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe and subject to the guardianship of the United States as to his political and personal status. This was clearly recognized in the leading case of *Jones* v. *Meehan*, 175 U. S. 1. There it appeard that an Indian chief owned in fee, land which fronted on a stream. The chief died, and in 1891 his son and heir, during the continuance of the tribal organization, let the land to Meehan for ten years. In 1894 he again let the same property to Jones for twenty years. In that year the Secretary of the Interior was authorized by Congress to approve the lease to Jones if the latter would increase the rental. This he did, and with the assent of the Indian and the Secretary of the Interior a lease was made to Jones. In the litigation which followed Meehan relied on the first contract made in the exercise of the Indian's right of private ownership. Jones relied on that made under congressional authority, and although the Indian was a member of the tribe and much more subject to legislative power than these plaintiffs, the court held that the subsequent act could not relate back so as to interfere with the right of property which the Indian possessed and conveyed as an owner in fee, and while Congress had power to make treaties, it could not affect titles already granted by the treaty itself."

The case of *Michigan Lumber Co.* v. *Rust*, 168 U. S. 589, 593, is reviewed in defendants in error's original brief at pages 84 to 88 inclusive, and the case of *Carter* v. *Ruddy*, [illegible] U. S. 493, 495, cited by plaintiffs [illegible]

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our original brief at pages 88 to 90 inclusive, and we think the review there given of these cases is sufficient answer to the contention made.

The case of *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, is a construction of grant to the Central Pacific Railroad Company by act of Congress of July 1, 1862. The court held that it was a present grant.

An examination of the case discloses that it is not only not an authority for the plaintiff in error, but if it decides anything applicable to the case at bar, it supports the contention of the defendants in error.

The syllabus of the case states the law as follows:

> "The grant of public land to the Central Pacific Railroad Company by the acts of July 1, 1862, 12 Stat. 489, c. 120, and July 2, 1864, 13 Stat. 356, c. 216, was a grant in *praesenti;* and the legal title to the granted land, as distinguished from merely equitable or inchoate interests, passed when the identification of a granted section became so far complete as to authorize the grantee to take possession. *Rutherford* v. *Greene*, 2 Wheat. 196, cited and followed.
>
> "Patents were issued, not for the purpose of transferring title, but as evidence that the grantee had complied with the conditions of the grant, and that the grant was, to that extent, relieved from the possibility of forfeiture for breach of its conditions. *Wisconsin Central Railroad Co.* v. *Price County*, 133 U. S. 496, 510 approved.
>
> "The provision in the statute, requiring the cost of surveying, selecting and conveying the land to be paid into the treasury before a patent could issue, does not impair the force of the operative words of transfer in it.
>
> "The railroad company could maintain an action for the possession of land so granted before the issue of a patent, and could transfer its title thereto by lease, so as to enable its lessee to maintain such an action."

In the opinion at page 249 Mr. Justice Field cites and quotes at length from the case of *Rutherford* v. *Greene's Heirs.*

of a patent and the effect of a patent is discussed by the court:

> "The question naturally arises as to the necessity for patents, if the title passed by the act itself upon the definite location of the road, when the alternate sections granted had become identified? We answer that objection by saying that there are many reasons why the issue of the patents would be of great service to the patentees, and by repeating substantially what we said on that subject in *Wisconsin Railroad Co.* v. *Price County,* 133 U. S. 496, 510. While not essential to transfer the legal right the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from the possibility of forfeiture for breach of its conditions. They would serve to identify the lands as coterminous with the road completed; they would obviate the necessity of any other evidence of the grantee's right to the lands, and they would be evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would thus be in the grantee's hands deeds of further assurance of his title, and, therefore, a source of quiet and peace to him in its possession."

It is also insisted that the Repealing Act of Congress was merely the exercise by the government of its administration of its guardianship for this poor Indian.

It would seem that this contention was sufficiently answered by the case of *Choate* v. *Trapp, supra,* but in support of this doctrine is cited the cases of:

Lone Wolf v. *Hitchcock,* 187 U. S. 553, 568.
Gritts v. *Fisher,* 224 U. S. 640, 642, 648.
Cherokee Nation v. *Hitchcock,* 187 U. S. 294, 307.
Stephens v. *Cherokee Nation,* 174 U. S. 445, 488.

All of these cases without exception, were cases involving the power of Congress over tribal property and tribal affairs and do not in any way, militate against the protection guaranteed to individual members of the different tribes as to their individual property.

The case of *Slidell* v. *Grandjean,* 111 U. S. 412, 440, upon

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is no question of doubt about the grant in the case at bar.

The plaintiff in error cites and quotes extensively from the case of *Levey* v. *Stockslager*, 129 U. S. 470. It can hardly be said that the grant in that case is equivalent to the grant in the case at bar. The direction to the Commissioner of the General Land Office was to issue certificates in new locations in eighty acre tracts to the said Elizabeth Bouligny and her said minor children to be located in any Land Office in the United States upon public lands subject to private entry at a price not exceeding $1.25 per acre. This act was passed on March 2, 1867, and on March 30, 1867, a joint resolution was adopted by the Congress directing the Secretary of the Interior to suspend the execution of the act until the further order of Congress, and no further order was thereafter made.

In discussing the question involved in that case, at page 475, *et seq.*, Mr. Justice Blatchford, speaking for the Court, has this to say:

> "The present case is not at all like the cases of which *Whitney* v. *Morrow*, 95 U. S. 551 and 112 U. S. 693 is a type. The statute involved in that case was the act of February 21, 1823, c. 10, 3 Stat. 724, in reference to land claims in the Territory of Michigan. The third section of that act directed that patents should be issued to persons whose claims to land had been regularly filed with the commissioners appointed under the act of May 11, 1820, c. 85, 3 Stat. 572, and whose claims had been favorably reported on by said commissioners; and the statute confirmed such persons in their claims. That was a statute confirming to persons claims to specific lands, and the patents were to issue for those very lands. The principle established by the decisions of this court in regard to such cases is one always to be adhered to. We do not depart from it in the present case, but only hold that it is not applicable here. The principle thus applied in *Morrow* v. *Whitney, supra*, is, that an act of Congress recognizing the validity of the claim of an individual to specific land, as against the United States, operates to transfer to him the interest of the United States, as effe-

vidual has the possession of the land, or some estate in it, and the United States still hold the legal title to it, the confirmation is substantially a conveyance of an estate or right in the land by the United States to such individual; and, where the land has boundaries which are clearly defined, or are capable of identification, such confirmation perfects the claimant's title to the very land, without the issuing of any patent therefor. But this doctrine necessarily applies only to a case where the United States intend, by the statute, to transfer to, and vest in, the beneficiary, a title to specific land. The present is not such a case."

This quotation from the opinion of the Court clearly distinguishes the case from the case at bar.

III.

As to the second point urged in plaintiff in error's brief that the act of June 17, 1910, shows clearly that the intention of Congress was that title should not vest until the issue of the patent and its acceptance by Rowell; for the reason that the vesting of Rowell's title was to be conditional upon the revesting in the United States, as guardian of the property of the tribe, of Rowell's claim to an allotment, and that in order to revest the United States, Rowell must accept the patent when issued. Citing the case of *Choate* v. *Trapp, supra,* and reading into the act a provision not contained in the act that Rowell must do something to accept the grant—more than was done in this case. We think this suggestion is sufficiently answered in previous paragraphs and in our original brief.

This Court will not legislate into the act of Congress, words not therein written. He requested his patent. The act clearly shows the intention of Congress to give him this land and to give to him a fee simple title to the land. No discretion was vested in the Secretary of the Interior to determine anything in relation to the land. He was not, by the act, vested with any judicial function or judicial power to pass

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was purely ministerial to put in motion the machinery by which the patent would be issued as other patents, in the name of the President. The right to the patent was complete. It required no further legislation to perfect the grant. The act in fact passed a fee simple title and all the authorities hold that where a grantee of public lands becomes entitled under the law to a patent, it is equivalent to a patent actually issued, the patent being only the proper and convenient evidence of the title.

If the act of June 17, 1910, vested no title in Rowell, it was not necessary to pass the act of December 19, 1910, in order for the plaintiff to maintain this action.

If the act of June 17, 1910, did pass title to Rowell, then the Congress by the act of December 19, 1910, could not divest him of that title. The title passed, if any, as expressed by the act, was a title in fee, and this case should be decided upon the rights passed by the act of June 17, 1910, regardless of the act of December 19, 1910.

If the act of June 17, 1910 had no force and accomplished nothing, then it was unnecessary to repeal the act.

What is there in the act of June 17, 1910 to indicate a mere promise on the part of the government?

There are no words in the act by which it can be inferred that there was any postponement of the time when the act should take effect. It became a law when signed by the President and passed the title.

The defendant Rowell could not maintain mandamus against the Secretary of the Interior because his only duty under the act was to set the machinery in motion and the patent should have been issued under the general provisions of the law in the name of the President, and the President is immune from any of the processes of the court.

The act does not say that title shall not pass until the patent is issued.

IV.

The third point in plaintiff in error's brief urges that even if the act of June 17, 1910 vested a legal or equitable title in Rowell, the Repealing Act of December 19, 1910, was not in violation of the Fifth Amendment, since Rowell received back, as compensation, the rights of allotment to which he was previously entitled.

It would hardly seem necessary to answer this suggestion. Rowell was to receive a patent in fee, he was vested with the title to this land, and the question as to whether it was valuable or not, if he had the right to it, and the property in it, is not of importance. If the Repealing Act took it away from him without a trial in a court of justice, the Congress sitting in judgment upon the rights conferred upon him by the act—its own act—if anything was granted to him by the act it certainly would be the taking of private property without compensation, and without due process of law by the fiat of a legislature vested with no judicial functions, and without judicial power.

V.

By the fourth ground of plaintiff in error's brief it is insisted that the act of June 17, 1910 did not vest legal title to the land and that, at the most, his title was an inchoate and equitable interest which he was entitled to have perfected by the issue of a patent, and, if so, that Rowell's defense in this case sets up an equitable title against a suit at law in ejectment by the government, and, that an equitable title cannot be set up or enforced in the federal courts as a defense in an action of ejectment.

Of course we insist that the act of June 17, 1910, confers a legal title.

What kind of a title was in the mind of Congress when it [illegible] the act?

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What do the words "The Secretary of the Interior is hereby authorized and directed to issue a patent in fee," import?

When was this patent to be issued?

The only intent to be gathered from the act that it was to be issued now on the approval of the act and if the act granted anything, it granted a fee title of which the patent was to be the evidence. But if there ever was a case in which an equitable title might be used as a defense, this is the case, because the President cannot be mandamused to issue the patent, if the government could not be sued to quiet the title and if the patent was necessary to pass the title, the defendant is remediless.

In the case of *Kirk* v. *Hamilton*, 102 U. S. 68, the question is discussed in a case from the Supreme Court of the District of Columbia.

In the opinion at page 75, the question is stated by Mr. Justice Harlan as follows:

> "In the view we take of the case, it is unnecessary to pass upon these several objections. If it be assumed that the record of the suit of *Moore & Co.* v. *Kirk, etc.*, was of itself, insufficient in law to divest Kirk of title to the premises in dispute, or to invest Hamilton with title, the question still remains, whether the facts disclosed by the first bill of exceptions do not constitute a defence to the present action."

Again at page 76, *et seq.*, the court say:

> "The only serious question upon this branch of the case is whether, consistently with the authorities, the defence is available to Hamilton in this action of ejectment to recover the possession of the property. We are of opinion that the present case comes within the reasons upon which rest the established exceptions to the general rule that title to land cannot be extinguished or transferred by acts in *pais* or by oral declarations. 'What I induce my neighbor to regard as true is the truth as between us, if he has been misled by my asseveration,' became a settled rule of property at a very early period in courts of equity. The same principle is thus stated by

Chancellor Kent in *Wendell* v. *Van Rensselaer,* 1 Johns. (N. Y.) Ch. 344: 'There is no principle better established, in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estopped."—p. 354.

"While this doctrine originated in courts of equity, it has been applied in cases arising in courts of law.

"In *The King* v. *The Inhabitants of Butterton,* (6 Durnf. & E. 554), Mr. Justice Lawrence said: 'I remember a case some years ago in which Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land.'

"In 2 Smith, Lead. Cas., pp. 730-740 (7th Am. Ed., with notes by Hare and Wallace), the authorities are carefully examined. It is there said that there has been an increasing disposition to apply the doctrine of equitable estoppel in courts of law."

The case of *Dickerson* v. *Colgrove,* 100 U. S. 578, Error to the Circuit Court of the United States for the Western District of Michigan, the syllabus states the law as follows:

"A., the owner in fee of lands in Michigan, died in February, 1853, leaving his two children B. and C. his only heirs-at-law. On March 3, C. and her husband conveyed the lands by warranty deed to D., who put it upon record March 6, 1854, and entered into possession of them April 1 of that year. D. learning of the existence of B., and that he lived in California, wrote to him, inquiring whether he made any claim to the premises. On April 1, 1856, the latter addressed from California to his sister C., in Michigan, a letter, wherein he said. 'You can tell D. for me he need not fear anything from me. * * * You can claim all there. This letter will be enough for him. I intended to give you and yours all my property there, and more if you need it.' The contents of

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sideration and by deeds with covenants of warranty, conveyed in fee the lands to E., and others, who thereunder have ever since occupied and improved them. July 9, 1865, B. conveyed the undivided half of them by quitclaim deed to F., who, March 6, 1873, brought ejectment. *Held*, 1. That B.'s letter of April 1, 1856, operates as an estoppel in *pais* which precludes him from setting up a claim to them, and is an available defence to the action. 2. That F. was not a *bona fide* purchaser, and that whatever title he acquired was subject to the legal and equitable rights of D. and those claiming under the latter."

This case reviews a number of authorities and the defense is based entirely upon the doctrine of equitable estoppel.

Here the grant was made. The defendant demanded and requested the evidence of his title conveyed by the grant. He had improved his property. He built his house in 1911. This suit was not instituted until 1913. Whatever may be said of the property (which we think makes no difference) the fact remains that it is an up-land farm in proximity, it is true, to a little town of five thousand people, with forty sections of land platted as a townsite. It may be that some persons had wild visions of the value of this property, but that is immaterial here, and we respectfully insist that the act was a grant which could not be destroyed by a legislative decree, and that the judgment of the trial court should be affirmed.

Respectfully submitted,

HENRY E. ASP,
HENRY G. SNYDER,
FREDERICK B. OWEN,
and WALTER A. LYBRAND,
Attorneys for Defendants in Error.